SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 456

RAY INGELS, AS DIRECTOR OF THE MOTOR VEHICLE DEPARTMENT OF THE STATE OF CALIFORNIA, ET AL., APPELLANTS,

vs.

HOWARD MORF, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF PACIFIC WHOLESALE AUTOMOBILE COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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[fol. 4]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

In Equity. No. 759-S

HOWARD MORF, Doing Business under the Firm Name and Style of Pacific Wholesale Automobile Company, Plaintiff and Appellee; United States Fidelity and Guaranty Company, a Corporation, and Continental Casualty Company, a Corporation, Sureties on Bonds Filed by Plaintiff and Appellee,

vs.

RAY INGELS, as Director of the Motor Vehicle Department of the State of California; Howard E. Deems, as Registrar of the Motor Vehicle Department of the State of California; John C. Corbett, Fred E. Stewart, R. E. Collins, Ray Edgar and Ray L. Riley, as Members of the State Board of Equalization and Constituting said Board in the State of California, and E. Seymour, Defendants and Appellants

NOTICE OF APPEARANCE—Filed September 14, 1936

The undersigned, Pierson & Block, Attorneys at Law, Compton, California, do hereby make and enter their appearance as attorneys of record for and on behalf of the appellees, United States Fidelity and Guaranty Company, a corporation, and Continental Casualty Company, a corporation, and do hereby acknowledge that the following documents were served upon said appellees on the 19th day of August, 1936.

1. Petition for Appeal to the Supreme Court of the United States.
2. Order Allowing Appeal.
3. Citation.
4. Statement of Evidence.

[fol. 5] 5. Statement of Jurisdiction of the Supreme Court.

6. Assignment of Errors on Appeal.

7. Proof of Service.

Dated this 10th day of September, 1936.

Pierson & Block, by Ralph K. Pierson

[fols. 6-12] [File endorsement omitted.]

Received copy of the within Notice of Appearance, this 14th day of September, 1936.

U. S. Webb, Atty. Gen'l of Calif., by Franklin Richards, Deputy Attorneys for Defendants and Appellants.

[fol. 13] In United States District Court

[Title omitted]

Bill in Equity—Filed September 25, 1936

Comes now the plaintiff and for cause of action against the defendants, alleges as follows, to-wit:

I

That plaintiff is a resident and a citizen of the City of Los Angeles, County of Los Angeles, State of California; that plaintiff is, and was at all times herein mentioned, engaged in business in said city, county and state aforesaid, under the firm name and style of the Pacific Wholesale Automobile Company; that prior to the commencement of this action, plaintiff has fully complied with the provisions of Section 2466 of the Civil Code of the State of California with respect to the filing and publication of fictitious firm names.

II

That defendant, Ray Ingels, is the duly appointed, qualified and acting Director of the Motor Vehicle Department of the State of California; that Russell Bevins is the duly [fol. 14] appointed, qualified and acting Registrar of the Motor Vehicle Department of the State of California; that the defendants John C. Corbett, Fred E. Stewart, R. E.

Collins, Ufin Jean Shontz and Ray L. Riley are the duly appointed, qualified and acting members of the State Board of Equalization of the State of California and constitute said Board; that E. Seymour is an agent, servant and employee of the other defendants named herein.

III

That the amount involved in this litigation is in excess of $3,000.00 exclusive of interest and costs.

IV

That since the 15th day of September, 1935, and up to and including the date of the filing of this action, the defendants and each of them, under and by virtue of alleged authority, claimed under and by virtue of an Act of the Legislature of the State of California, denominated Chapter 402, Statutes of 1935 of the State of California, said Act being entitled:

"An Act to regulate the carrywanning of motor vehicles upon the public highways of this state, defining the term "carrywanning" and providing for the licensing of motor vehicles in carrywan and imposing penalties for violation thereof."

have demanded and do now demand that plaintiff, before moving his automobiles into the State of California, obtain a license from the Board of Equalization of the State of California, required of persons transporting property for hire and to pay a fee of $25.00 therefor and to obtain a special permit for each of plaintiff's motor vehicles which he seeks to bring into the State of California and to pay for each of such permits the sum of $15.00.

That a copy of said Chapter 402 of the Statutes of 1935 of the State of California is hereto attached, marked Exhibit "A" and by this reference made a part hereof, with the same force and effect as though set forth in full at this place.

[fol. 15] V

That plaintiff's sole occupation is that of a dealer in automobiles and he is engaged in the business of buying, selling and trading of automobiles and that he has been engaged in such business for several years last past and has

succeeded in building up a business, the value of which he alleges to be in excess of $25,000.00 and from which he has derived a good income and livelihood. That plaintiff has complied with the laws of said city, county and state aforesaid, relating to such business.

VI

That plaintiff, in the occupation and conduct of his said business as an automobile dealer, purchases motor vehicles of the ordinary pleasure type only, in the States of Texas, Louisiana, Arkansas, Tennessee and other southern and eastern states, and drives them from the point of purchase to his place of business in the said City of Los Angeles, State of California;

That at the time plaintiff purchases said automobiles and during the period said automobiles are so driven from said points of purchase in other states to the said place of business of plaintiff in Los Angeles, California, and until the same are sold, plaintiff is engaged solely in interstate commerce:

That the purchasing of said automobiles by plaintiff as aforesaid is essentially necessary to the continued conduct of his business and that if he is deprived of the right to purchase and drive said automobiles into the State of California and over the highways of said state to his place of business in the City of Los Angeles, for the purpose of sale, and of the right to sell the same, he will lose his business and thereby suffer an irreparable injury.

VII

That on or about the 19th day of September, 1935, the plaintiff purchased a 1935 Dodge Sedan motor vehicle at the City of Shreveport, State of Louisiana, bearing 1935 [fol. 16] Louisiana License number 108946, and a 1934 Oldsmobile Coupe motor vehicle in the City of Tyler, State of Texas, bearing 1935 Texas license number 869642; that immediately thereafter he caused said automobiles to be driven to the state line of California, near Blythe, California, in the manner following, to-wit: By causing the said Dodge Sedan motor vehicle to be driven under its own power and on its own wheels, and causing the said Oldsmobile Coupe motor vehicle to be towed on its own wheels, attached to the rear of said Dodge Sedan automobile:

That on or about the 19th day of September, 1935, plaintiff purchased a 1934 Dodge Sedan motor vehicle in the City of Tyler, State of Texas, bearing 1935 Texas license number 865530; that immediately thereafter he caused said motor vehicle to be driven to the state line of California, near Blythe, California, in the manner following, to wit: By causing the said motor vehicle to be driven under its own power and on its own wheels.

VIII

That plaintiff thereupon attempted to cause said motor vehicles mentioned in paragraph VII, to be driven into the State of California, in the manner in said paragraph VII specified, at the place above referred to; that at said times and places the defendant, E. Seymour, an agent, servant and employee of the other defendants herein named, and each of them, did refuse to permit plaintiff's said automobiles to enter the State of California, unless and until the plaintiff should first secure of the Motor Vehicle Department of the State of California, a special permit as to each of said vehicles, for the use of the highways of said state and pay therefor a fee of $15.00 for each of such permits, and further, unless and until he had made an application to and secured from the Board of Equalization, a license required of persons transporting property for hire, and pay a fee of $25.00 therefor; and also until the plaintiff had [fol. 17] produced evidence to the satisfaction of the Motor Vehicle Department and the said defendants named, that all of the laws of the State of California, relating to the transportation of property upon the public highways thereof, for hire, had been complied with by this plaintiff; that plaintiff refused to comply with said demand and that thereupon said defendants, and each of them, their agents, servants and employees, refused to permit said vehicles to be moved into the State of California, upon its public highways in the manner aforesaid; that said vehicles are now at the border line of the State of California; that there is no market for said vehicles at the place where they now are.

That your plaintiff alleges that he is the sole owner of said motor vehicles so purchased and driven as aforesaid, and that he is not engaged in the business of the transporting of property for hire, by motor vehicles upon the public highways of said State of California, in his operation of

said motor vehicles or otherwise; and that when he does bring said motor vehicle or either of them into the State of California, it is not his intention to, and he will not insofar as the operation of said motor vehicles is concerned, engage in the transportation of property for hire by motor vehicles upon the public highways of said state; that he is not now engaged with any motor vehicles within the State of California, in the business of transportation of property for hire.

IX

That it is necessary, in the conduct of plaintiff's said business, to bring said automobiles into the State of California;

That said defendants, and each of them intend to, threaten to, and will continue to make the same demand against the plaintiff in every instance in which plaintiff attempts to move an automobile into the State of California, for the purpose of sale in any of the manners aforesaid, and to [fol. 18] invoke against this plaintiff the penalties imposed by the said laws prescribed, for any failure on the part of plaintiff to secure said permits and pay said fees and charges; that there is no provision of law whereby and whereunder this plaintiff may recover from said defendants, or from the State of California, any sums, fees or charges by him paid or to be paid as aforesaid; that if said defendants be permitted to carry out their aforesaid threats and intentions and to enforce as against this plaintiff the provisions of said statute, and unless said defendants, their deputies, servants, agents and employees be enjoined and restrained from so doing, this plaintiff and his aforesaid business will suffer irreparable loss and injury and the rights of this plaintiff in, and to carry on said business, and the protection to this plaintiff guaranteed under the provisions of Section 8 of Article 1 and under the provisions of the Fourteenth Amendment to the Constitution of the United States will be violated, destroyed and held for naught.

That your plaintiff has no plain, speedy or adequate remedy at law.

X

That plaintiff's business is chiefly the wholesaling of said automobiles, and that he has been so engaged in said busi-

ness for approximately four years last past; that plaintiff has operated and is now operating upon a small margin of profit, because of conditions over which he has no control, and that under his present operations he is unable to make in excess of $15.00 per car so dealt in as aforesaid; that if plaintiff be compelled by the Acts of defendants, and each or any of them, as now asserted and threatened, as aforesaid, to transport said automobiles in any other manner than is described in this complaint, or if he be compelled to pay the sums of money demanded by defendants, and each of them, or be compelled to comply with any of [fol. 19] the demands of defendants and each of them, he will lose money on each and every motor vehicle transaction, thereby making it impossible for plaintiff to continue in business, and thereby making it immediately necessary for plaintiff to discontinue business.

XI

That the said Chapter 402 of the Statutes of 1935 of the State of California is unconstitutional upon the following grounds and for the following reasons, among other things, to-wit:

(a) That said act is in contravention of, and repugnant to Article 1, Section 8 (commonly referred to as the "commerce clause") of the Constitution of the United States, in this;

That said statute places a direct burden upon interstate commerce and is not for the purpose of regulation, but is a revenue measure only;

That said act is not based upon any reasonable basis of licensing, but is arbitrary, discriminating and unfair and its effect is the burdening of business in interstate commerce and is intended to, does and will so cripple plaintiff's business in interstate commerce that it will be impossible for plaintiff to continue in said business;

That said act is in no sense a police regulation of the use of the highways of the state or for the protection of the health, morals or safety of the public;

That said act constitutes an illegal charge upon this plaintiff, for the privilege of engaging in interstate commerce;

That the charges and fees required of plaintiff under said statute are arbitrary, unreasonable and excessive in amount

and bear no reasonable relation to plaintiff's use of the highways of the State of California.

(b) That said Act is in contravention of, and repugnant to the 14th Amendment to the Constitution of the United [fol. 20] States, in this:

That it deprives this plaintiff of his property, to-wit: money he is required to pay for use of the public highways of the State of California, without due process of law;

That it further deprives this plaintiff of his property, to-wit: of his business of buying, selling and dealing in automobiles and of his right to engage in said lawful business, without due process of law;

That it denies to this plaintiff, when engaged in interstate commerce in the State of California, as aforesaid, the equal protection of the law;

That it applies only to those persons, firms or corporations using the highways for transportation of motor vehicles for purpose of sale and does not apply to other persons using said highways for pleasure or purposes other than sale, which distinction and classification is arbitrary and unreasonable;

That said tax and charge is wholly disproportionate to other taxes, fees or other licenses charged by the State of California, either for the registration of vehicles in said state or for vehicles using the highways in said state;

That said tax and charge is exorbitant and arbitrary and unfair to such a degree that the interstate business in which plaintiff is engaged in the State of California will return a revenue to said state in proportion far in excess of other fees, licenses or taxes charged other persons for the use of the highways of said state;

That said statute unreasonably and arbitrarily classifies the business of this plaintiff as the transportation of property for hire, which said classification is arbitrary, unreasonable, and discriminatory.

Wherefore, plaintiff prays this Honorable Court [fol. 21] 1. For a temporary restraining order of this Court directed to the said defendants, their agents, servants, employees and deputies, and all persons acting under and through their authority, respectively, as Director of the Motor Vehicle Department of the State of California, Regis-

tion of Motor Vehicles of the State of California, and its members and constituting the Board of Equalization of the State of California, enjoining and restraining them, and each of them, from enforcing or attempting to enforce, against the plaintiff, the provisions of said Chapter 102 of the Statutes of 1933 of the State of California

3. For a citation directed to said defendants, and each of them, ordering them to appear before a three judge court at a time and place to be hereafter fixed by order of Court, and there show cause, if any they have, why a temporary injunction should not be issued herein as by the law and practice of this court contemplated

4. For a final and permanent injunction upon hearing of the merits of this cause before a three judge court, finally and permanently enjoining each of the said defendants, their agents, accounts, employees and deputies, and all persons acting under or through their authority as such respective officials, from enforcing or attempting to enforce against the plaintiff, the provisions of said Chapter 102 of the Statutes of 1933 of the State of California, and from assessing or attempting to exact from this plaintiff, the payment of any sums, charges or fees in said statute mentioned fully required of him to be paid by reason of his ownership and intended use of the highways of the State of California in the manner hereinabove set forth.

5. Said plaintiff prays for such other and further relief in the premises as to the Court may seem [illegible] and [illegible] [Vol. 22] table and just

Byron J. Walters, Pierson & Black, by Ralph K. Pierson, Attorneys for Plaintiff.

Duly sworn to by Howard Morf. Jurat omitted as prescribed.

[fol. 23] EXHIBIT "A" TO BILL OF COMPLAINT

Assembly Bill No. 2416

Chapter 402

AN ACT to Regulate the Caravaning of Motor Vehicles Upon the Public Highways of This State, Defining the Term "Caravaning" and Providing for the Licensing of Motor Vehicles in Caravan and Imposing Penalties for Violation Thereof

(Approved by the Governor July 6, A. D. 1935)

The People of the State of California Do Enact as Follows:

Section 1. The term "caravaning" as used in this act shall mean the transportation from without the State of any motor vehicle operated on its own wheels, or in tow of another motor vehicle, for the purpose of selling or offering the same for sale to or by any agent, dealer, manufacturers' representative, purchaser or prospective purchaser, whether such agent, dealer, manufacturers' representative, purchaser or prospective purchaser may be located within or without this State. The caravaning of motor vehicles as herein defined shall be considered as the transportation of property for hire by motor vehicle and shall be subject to all the laws of this State relative to the transportation of property for hire by motor vehicle upon the public highways of this State.

Section 2. No person, firm or corporation shall use any highway in this State for caravaning motor vehicles unless and until there shall first have been secured from the Motor Vehicle Department of the State of California a special permit as to each vehicle so caravaned, for use of the highways of this State in caravaning such vehicle, which permit shall be displayed by posting the same upon the windshield of such vehicle or in other prominent place thereon where it may readily be legible. It shall be unlawful to operate three or more vehicles or groups of vehicles in caravan unless a space of at least one hundred fifty feet shall at all times be maintained between each vehicle or group of vehicles being so caravaned.

Section 3. As a condition precedent to the issuance of any special permit provided for in the previous section of this act the Motor Vehicle Department of the State of California shall charge and collect a fee of fifteen dollars for each motor vehicle for which a caravan permit may be issued, whether such vehicle be operated under its own power or in tow of another motor vehicle; provided, however, that no such permit shall be issued by said Motor Vehicle Department unless and until the applicant therefor shall have produced evidence to the satisfaction of said Motor Vehicle Department that all of the laws of this State relating to the transportation of property upon the public highways thereof for hire shall have been complied with.

Section 4. No permit issued under this act for caravaning motor vehicles or vehicles shall be transferable either as between persons or as to the vehicle for which it is issued, and shall only be valid for the trip or trips to be specified in said permit, and in no event shall such permit be valid for a period of more than ninety days after it shall have been issued. Such permit shall contain such information [fol. 24] and be in such form and shall be issued under such rules and regulations as may be prescribed by said Motor Vehicle Department. Such permit shall be conditioned upon the permit-ee complying with all the laws of the State of California and the United States.

Section 5. The fee paid for any caravaning permit issued under this act shall be in lieu of all other registration fees and license fees for the use of public highways in this State by motor vehicle during the period that such motor vehicle may be operated under and in accordance with such permit upon the public highways in this State; provided, however, that nothing in this section shall exempt the owner or operator of such vehicle from compliance, except with respect to fees or license charges, with all laws of this State now or hereafter adopted, relating to the transportation of property for hire.

Section 6. All fees from the issuance of permits collected by the Motor Vehicle Department under this act shall be paid into the general fund in the State Treasury.

Said department shall file with the Controller on or before February first and August first of each year, a detailed account of the receipts of said Department from this source

for the six months next preceding. The moneys so derived by the State are intended to reimburse the State treasury for the added expense which the State may incur in the administration and enforcement of this act and the added expense of policing the highways over which such caravaning may be conducted, so as to provide for the safety of traffic on such highways where caravaning is being conducted.

Section 7. Violation of the provisions of Section 2 or of section 4 of this act is a misdemeanor punishable by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

[File endorsement omitted.]

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE
Filed September 25, 1935

Whereas, in the above entitled cause it has been made to appear by the verified bill in equity duly filed herein, upon the grounds of the unconstitutionality of Chapter 492, of the Statutes of 1935, of the State of California, and upon further grounds that immediate, great and irreparable injury and damage will be caused to the plaintiff before the hearing of the application for interlocutory injunction can be had, and it appearing that the plaintiff has no plain, speedy or adequate remedy at law, that the issuance of a temporary restraining order, preliminary to hearing upon the application for an interlocutory injunction is proper and that plaintiff is entitled thereto, suspending and restraining the enforcement, operation and execution of such statute by restraining the action of the defendants and each of them from the acts complained of and about to be committed.

[fol. 26] Now, on motion of the plaintiff, it is Ordered, Adjudged and Decreed that the defendants, Ray Ingels, as

Director of the Motor Vehicle Department of the State of California, Russell Bevins, as Registrar of the Motor Vehicle Department of the State of California, John C. Corbett, Fred E. Stewart, R. E. Collins, Orfa Jean Shontz and Ray L. Riley, as members of the State Board of Equalization and constituting said board, in the State of California and E. Seymour, appear before a three judge court consisting of three United States Judges, one of whom shall be a Circuit Judge, sitting to hear this matter at 10:00 o'clock A. M. at the United States Court House, Los Angeles, California, on the 4th day of October, 1935, and then and there to show cause, if any they have, why an interlocutory injunction as prayed for in said bill should not issue.

And it is Further Ordered that pending the hearing and determination of said interlocutory injunction that the defendants, Ray Ingels, as Director of the Motor Vehicle Department of the State of California, Russell Bevins, as Registrar of the Motor Vehicle Department of the State of California, John C. Corbett, Fred E. Stewart, R. E. Collins, Orfa Jean Shontz and Ray L. Riley, as members of the State Board of Equalization and constituting said board, in the State of California and E. Seymour, and each of them and their agents, servants and employees and all other persons acting under, through or by the authority of them or either of them, or by virtue of their said office, be and they hereby are jointly and severally enjoined and restrained specially and until further order of this Court in the enforcement of the provisions of said Chapter 402 of the 1935 Statutes of the State of California, and from the collection or attempted collection of the fees, taxes, licenses or charges therein provided for as against the plaintiff herein;

[fol. 27] It is Further Ordered that plaintiff give bond with good and sufficient surety in the sum of ($2,000.00) Two Thousand Dollars, which said bond shall be in the manner and form and upon the conditions required by law and approved by the clerk of this Court;

It is Further Ordered that a copy of this order be served on the defendants and each of them herein named and that at least five (5) days notice of the hearing aforesaid be

given respectively to the Governor and Attorney General of the State of California and to each of said defendants.

Dated this 25th day of September, 1935.

Albert Lee Stephens, District Judge.

3:50 P. M.

[File endorsement omitted.]

[fols. 28-42] Subpoena and marshal's returns, showing service on Russell Bevins et al., omitted in printing.

[fol. 43] In United States District Court.

[Title omitted]

Joint Return to Order to Show Cause, and Joint Answer, of all of the Defendants. Filed October 22, 1935

Come now the defendants, jointly, and for return to the order to show cause entered herein by the Court on the 25th day of September, 1935, and for answer to the plaintiff's Bill in Equity, state:

I

Answering Paragraph I of said Bill, the defendants admit that plaintiff is a resident and citizen of the City of Los Angeles, County of Los Angeles, State of California; but as to each and every other allegation of said paragraph the defendants are without knowledge and therefore deny the same.

II

Answering paragraph II of said Bill, the defendants admit the allegations thereof.

[fol. 44] III

Answering paragraph III of said Bill, the Defendants are without knowledge as to the allegations thereof and therefore deny the same.

IV

Answering paragraph IV of said Bill, defendants admit that they intend to enforce the provisions of Chapter 402, Statutes of 1935 of the State of California, except as they may be restrained by this Court. Further answering said paragraph IV, defendants state that it is not required by said Chapter 402 or any other laws of California that persons desiring only to move motor vehicles in caravan, as defined in said Chapter 402, pay the said fee of $25.00 required of persons transporting property for hire, and defendants therefore do not demand that plaintiff pay said fee of $25.00. Further answering said paragraph IV, defendants admit that they have demanded and do now demand, except as restrained by this Court, that plaintiff and all other persons within the terms of said Chapter 402 obtain a special permit for each motor vehicle within the terms of said Chapter 402 which plaintiff and said other persons seek to move upon the highways of California, and that these defendants will require payment of $15.00 for each of such special permits. Defendants admit that "Exhibit A", attached to plaintiff's Bill, is a copy of said Chapter 402, Statutes of 1935, of the State of California.

V

Answering paragraph V of said Bill, the defendants are without knowledge as to the truth of the allegations thereof, and therefore deny the same.

[fol. 45]

VI

Answering paragraph VI of Plaintiff's Bill, defendants admit that plaintiff purchased motor vehicles in Texas, Louisiana, Arkansas, Tennessee, and other southern and eastern states and drives them from the point of purchase to his place of business in Los Angeles. Defendants further state that nothing in said Chapter 402 deprives the plaintiff of any rights which he may desire to exercise as described in said Paragraph VI, but that said Chapter 402 only requires the plaintiff, first, to pay a license fee under the State's police power and as compensation for the use by the plaintiff in his business of the State's highways, and second, to conform to laws and regulations of the State

necessary for the preservation of the State's property and of the safety of the State's inhabitants.

As to whether plaintiff is engaged solely in interstate commerce, as alleged in said Paragraph VI, defendants are without knowledge and therefore deny the same.

VII

Answering Paragraph VII of said Bill, the defendants are without knowledge as to the truth of the allegations thereof, and therefore deny the same.

VIII

Answering Paragraph VIII of Plaintiff's Bill, defendants state that they have refused and will continue to refuse, except as restrained by order of this Court, to permit plaintiff to operate motor vehicles upon the highways of California, in the manner described and defined in said Chapter 402, unless plaintiff shall comply with the requirements of said Chapter 402. As to the description of [fol. 46] vehicles which plaintiff has attempted to operate upon the highways of California without compliance with the terms of said Chapter 402, defendants at this time are without knowledge. Defendants further state that they do not now and will not in the future demand that plaintiff pay a fee of $25.00 for a license required of persons transporting property for hire; that said license authorizing the transportation of property for hire will be issued without charge to persons desiring only to caravan as defined in said Chapter 402, upon application therefor.

As to the allegation in the last sub-paragraph of said paragraph VIII of said Bill, that plaintiff is the sole owner of said motor vehicles so purchased and driven, the defendants are without knowledge and therefore deny the same. As to the further allegations in the last sub-paragraph of said paragraph VIII of said Bill, that plaintiff in operating said motor vehicles as described in said Bill is not engaged in the transportation of property for hire, the defendants are without knowledge; but the defendants further state that the truth or untruth of said allegation is wholly immaterial and irrelevant to any issues made by plaintiff's Bill.

IX

Answering Paragraph IX of said Bill, defendants admit that it is their intention, except as restrained by order of the Court, to enforce the provisions of said Chapter 402 as aforesaid. Defendants further admit that there is no provision of law whereby plaintiff may pay the license fee required by said Chapter 402, and thereafter recover the same from the defendants or the State of California. Fur- [fol. 47] ther answering said Paragraph IX, defendants deny that the enforcement of said Chapter 402 will cause the plaintiff to suffer an irreparable loss and injury or will deprive the plaintiff of any of his rights under the Constitution of the United States.

X

Answering Paragraph X of said Bill, the defendants state that as to the truth of the allegations thereof, the defendants are without knowledge and therefore deny the same. Further answering said Paragraph X, the defendants state that even if the allegations of said paragraph were true, the same are wholly immaterial and irrelevant and have no bearing upon any issue made by the plaintiff's Bill.

XI

Answering sub-paragraph (a) of Paragraph XI of said Bill, defendants deny that said Chapter 402, Statutes of 1935 of the State of California, is unconstitutional. Defendants specifically deny that said Chapter 402 is in contravention of, or repugnant to, the "Commerce Clause" of Section 8, of Article I, of the Constitution of the United States. Defendants further specifically deny all and each and every allegation in said sub-paragraph (a) of Paragraph XI wherein plaintiff alleges and claims that said Chapter 402 violates the "Commerce Clause" of the Constitution.

Further answering sub-paragraph (a) of Paragraph XI, defendants state that the permit fees of which plaintiff complains are a charge made by the State of California in the exercise of its police power, and are a charge for the use made by the plaintiff of its highways in carrying on

the plaintiff's business of caravaning automobiles there, and are reasonable and just in amount, and that the impo- [fol. 48] sition of said fees does not violate the rights of the plaintiff as defined in the "Commerce Clause" of Section 8, of Article I, of the Constitution.

XII

Answering sub-paragraph (b) of said Paragraph XI of said Bill, the defendants deny that said Chapter 402 is in contravention of, or repugnant to, the Fourteenth Amendment to the Constitution of the United States. Defendants specifically deny all and each and every allegation in said sub-paragraph (b) to the effect that said Chapter 402 violates the Fourteenth Amendment to the Constitution. Defendants specifically deny that the license fees required to be paid by said Chapter 402 are disproportionate to the other license fees or charges of any nature whatsoever charged by the State of California for the registration of vehicles or for the use by vehicles of the highways of the State. Defendants specifically deny that the license fees required to be paid by said Chapter 402 are either exorbitant or arbitrary or unfair and deny that said license fees will return a revenue to the State of California excessive in proportion to the other fees, licenses, or taxes charged other persons for the use of the highways of California.

Further answering sub-paragraph (b) of Paragraph XI of plaintiff's Bill, defendants state that, by reason of the special and distinct characteristics of the manner of the use made by plaintiff of the highways of Cailfornia and by reason of the special and distinct characteristics of the operation of "caravaning" motor vehicles as defined and described in said Chapter 402, the classification and separate treatment defined and made in said Chapter 402 is a [fol. 49] reasonable, valid, and just classification, and is based upon actual and substantial grounds; and that said Chapter 402 does not violate the "equal protection of the laws" clause of the Fourteenth Amendment to the United States Constitution, and does not violate the "due process of law" clause of the Fourteenth Amendment.

XIII

For further return, and answer to said Bill, the defendants state that this Court has no jurisdiction of this cause and the plaintiff is not entitled to a temporary injunction herein, nor to any of the relief prayed for in plaintiff's Bill, nor to any equitable relief in this Court whatsoever, because:

(a) Plaintiff's Bill does not allege or set forth any facts or grounds showing any deprivation of plaintiff's rights under that part of Section 8, of Article I, of the Constitution of the United States known as the "Commerce Clause";

(b) Said Bill does not allege or set forth any facts or grounds showing that said Chapter 402 violates any rights of the plaintiff guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

XIV

Further answering plaintiff's Bill, defendants state that the regulation and charge complained of by plaintiff is not a regulation of, or charge made by, the state for the transportation of motor vehicles in or across the state but is a regulation of, and charge made for the use of, the public highways of the state of California for that purpose. Defendant further states that the public highways are the property of the state of California and have been built and are being maintained at a great expense to the said State [fol. 50] of California; that such highways are a valuable facility and that the use of such highways is a valuable privilege; that the use of such facilities as regulated by said Chapter 402 is a commercial, extraordinary use and that when the highways of the state are so used they are used for direct gain or profit and as a place of business for those engaged in the operations regulated by said Chapter 402; and that the use of such highways as described by plaintiff is of substantial value to the said plaintiff.

XV

Defendants further state that the highways of the State of California, and particularly the highway described in plaintiff's Bill, are regularly and customarily traversed at all hours of the day and night by great numbers of motor

vehicles of every description and by other vehicles and that additional traffic upon such highways adds to and increases the wear of the same and the cost and expense of maintaining them, increases the hazards incident to such use, and increases the cost of supervising and regulating the traffic thereon and that the operations carried on by plaintiff as described in plaintiff's Bill, and by others similarly affected by such Chapter 402, are substantial and involve the movement of a great many motor vehicles and result in a great and substantial volume of such additional traffic.

XVI

Defendants further state that the operations of plaintiff, as described by his Bill herein and by others affected by said Chapter 402, are of an unusual and dangerous character in that vehicles so moved are customarily and ordinarily moved in long processions or caravans, that by the use of tow bars or similar attachments the vehicles so [fol. 51] moved are usually operated in tandem or in pairs, one car operated by a driver and pulling another driverless car, that such two car units are frequently operated with minimum or inadequate space between them and at varying speeds, the speed of such trains being uniformly slower than the ordinary stream of traffic on inclining grades and frequently on level roads and frequently at excessive speeds when being moved down grade; that such cars so transported are usually ordinary passenger cars equipped with motive power and brakes originally designed to propel or restrain only one vehicle and that the speed, pickup and braking efficiency of such cars is usually impaired or reduced by the coupling and pulling of one car by another of such cars; that the coupling of such cars usually results in the impaired vision of the driver of the towing car in the rear view mirror; that the close coupling of such cars and their operation in trains makes it difficult for those overtaking or about to pass such caravans to observe the drivers signals as to his intentions as to stopping or turning; that such cars are usually operated by a preponderance of persons as drivers who have no ownership or interest in the same and who are only concerned with securing their own transportation to California or other destination; that such drivers are usually inexperienced, not familiar with the vehicle or vehicles they are operating, not familiar with the

highways over which they operate, not accustomed to steady driving and for distances as great as those usually negotiated by such caravans; that only a small percentage of such drivers are paid for their services except in the form of the transportation of their persons to destination; that they are frequently underfed and have been driving or continue to drive such cars for excessively long and strenu- [fol. 52] ous hours upon entering and upon continuing through the state.

XVII

Defendants further state that the plaintiff is engaged exclusively in handling used cars or vehicles which have previously been owned and frequently operated for many miles by others and which have been registered under the laws of some other state; that in order to prevent traffic in stolen automobiles and to minimize the theft of automobiles it is essential and necessary for officials of the State of California to carefully scrutinize and devote special effort to the traffic in and movement over the highways of such used cars.

XVIII

Defendants further state that in order to protect the residents of the State of California and others of the state in their use of the public highways and to provide for their safety and convenience in such use, and in order to regulate, supervise, and control the operations over the public highways by the plaintiff and by others regulated by said Chapter 402, it is necessary for the State to maintain a state highway patrol or police force, the maintenance of which is accomplished at a substantial expense to the state of California.

Defendants further state that in order to collect and attain efficiency in the uniform collection of the fees imposed under the provisions of said Chapter 402, it is necessary for the state to maintain officers, agents, and clerks and to furnish supplies and materials at a material and substantial expense to the State of California.

XIX

Defendants further state that in order to protect the safety and convenience of residents of the state and those

[fol. 53] who use the public highways of the state, and to deter motor vehicle operators from reckless driving upon such highways, it is necessary for the state to require the registration and numbering of all motor vehicles used on the public highways of the state for purposes of identification of those who operate such vehicles. That none of the motor vehicles which plaintiff desires to move upon the highways of the State of California, according to the manner of his operations and business, as described in his Bill, are registered in the State of California; and plaintiff desires to move said vehicles for a great distance over the highways of California without any identification or registration of said vehicles in the State of California..

XX

Defendants further state that the business described in plaintiff's Bill and engaged in by plaintiff is primarily a transportation business by means of which plaintiff and others similarly engaged are enabled to purchase cars at places where prevailing markets are low, to move them over the highways in the manner described herein at low cost to places where markets are high due to original transportation costs and to thus sell such vehicles at a profit in competition with other vehicles of identical kind, model, style, age and make which were not originally moved under their own power over the public highways. That automobiles, pursuant to a custom of the trade of many years standing, are sold at nationally advertised prices "freight on board" Detroit, Michigan, or its immediate vicinity, plus railroad freight charges to place of sale and ultimate delivery; that the railroad transportation costs increase with the distance from Detroit and vicinity and that as a result vehicles [fol. 54] originally sold at great distances away from Detroit and vicinity are sold new for substantially higher prices than those sold new at points much closer to Detroit and vicinity. That the original sale price of such vehicles has a proportional and direct relationship to the trade-in and resale value of used cars and that the used car market in such respective areas varies in about the same proportion. That principally, by reason of these facts, plaintiff and others similarly situated are able to buy cars in low markets and sell them below the usual price in such higher markets by reason of the inexpensive or low-

cost method of moving them to such place of sale. That such vehicles are of the identical kind and quality of other vehicles available on such higher markets at such higher prices and that the principal ingredient placed in such cars by plaintiff and others engaged in such caravaning is the transportation in the manner herein described. That the caravaning of such cars is the principal portion of the business so engaged in and that the purchase at low markets and sale at higher markets is purely an incident to such business and that such caravaning is chiefly a transportation business and by its nature may be properly and separately classified and regulated as distinguished from ordinary highway use.

Wherefore, defendants pray that the restraining order heretofore issued be dissolved, for costs of suit, and for such other and further relief as to the Court may seem adequate, equitable and just.

U. S. Webb, Attorney General of the State of California, by Frank Richards, Deputy Attorney General of the State of California, Attorneys for Defendants.

[fol. 55] *Duly sworn to by Ray Ingels. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 56] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANTS' EXCEPTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed June 5, 1936

Come now the defendants and except and object to the proposed Findings of Fact and Conclusions of Law submitted herein, on the following grounds:

Exceptions and Objections to Proposed Findings of Fact Found as True

1

Exceptions to 4th Finding

Defendants except to the 4th proposed Finding of Fact found as true, on the ground that the purpose of Chapter

402, Statutes of 1935, is to be understood and determined by the terms of said Act and all of the other statutes of California and the evidence in this case, and not especially and particularly by the consideration of the other Acts mentioned in said 4th Finding.

[fol. 57] 2

Exceptions to 6th Finding

Defendants except to the 6th Finding on the ground that the evidence shows that the term "caravaning" as defined in said Chapter 402 includes and circumscribes a well defined movement of motor vehicles which presents problems and difficulties not present in movements of motor vehicles not included within said definition, and that the included movement is generally and characteristically a fleet movement, and so preponderantly such as to make any exceptions negligible and immaterial as a matter of fact and law.

3

Exceptions to 7th Finding

The 7th Finding is excepted to for all of the reasons stated in the preceding exception, and on the further ground that the evidence and said Chapter 402 show that the Legislature in enacting said Chapter took into consideration an existing problem and by said Chapter properly defined the class presenting such problem and properly dealt with it. The purpose of the Act is likewise to be ascertained by consideration of other statutes including those imposing safety regulations upon motor vehicle operators, and is not to be limited solely to the provisions of the Act itself. There is no specific complaint as to the effect of said Act upon a single car movement.

4

Exceptions to 8th Finding

Defendants except to the 8th Finding on the ground that it is not supported by the evidence, and because the evidence shows that the movement of a single vehicle, as

[fol. 58] therein described, and the movement of all vehicles included within the definition of "caravaning" does present unusual police problems.

5

Exceptions to 9th Finding

Same as exception to 8th Finding.

6

Exceptions to 11th Finding

Defendants except to the 11th Finding on the ground that plaintiff's bill of complaint and the evidence show that plaintiff's occupation is principally that of transporting used motor vehicles from points where the market price is low to California where the market price is high; that such transportation is the entire basis of plaintiff's business; that the evidence shows that once plaintiff's cars arrive in California they are quickly and easily disposed of, and that the sale of such cars in California is only a minor and incidental part of plaintiff's business.

7

Exceptions to 13th Finding

Defendants except to the 13th Finding on the ground that as soon as plaintiff's automobiles arrive on California soil for the purpose of sale in California they acquire a situs in California and their movement thereafter is in intrastate commerce.

8

Exceptions to 14th Finding

Defendants except to the 14th Finding on the ground that there is nothing in said Chapter 402 which deprives plaintiff of the right to purchase and drive said automo-[fol. 59] biles for the purpose of sale, or of the right of selling the same; and the facts found in said Finding as true are immaterial.

9

Exceptions to 15th Finding

Defendants except to the 15th Finding on the ground that there is no evidence to sustain the same; and that if the said Finding were true that the same, coupled with the allegations of paragraphs VII and VIII of plaintiff's bill of complaint show conclusively that the movements described in said 15th Finding are not in fact, as claimed, single car movements, but constitute a fleet movement, that is, a movement composed of more than one vehicle moved together at one time, that is, at least three vehicles moved together at one time. Furthermore, there is nothing in the record to show that the three vehicles described in said 15th Finding and in said paragraphs VII and VIII of plaintiff's bill of complaint were not a part of a larger caravan.

10

Exceptions to 16th Finding

Defendants except to the 16th Finding on the grounds set out in the preceding exception, and on the grounds that there is no issue made in plaintiff's bill of complaint of the demand of a fee for driving a single motor vehicle or for driving two motor vehicles joined by a tow-bar, and the 15th Finding which is relied upon to support said 16th Finding is itself not supported by the evidence as pointed out in the preceding exception.

11

Exceptions to 17th Finding

Defendants except to the 17th Finding in so far as it pur- [fol. 60] ports to relate to a specific instance of the movement of single cars not in caravan or with other cars or two cars joined together by a tow-bar not in caravan or with other cars.

12

Exceptions to 18th Finding

Defendants except in part to the 18th Finding on the ground that the evidence shows that some of plaintiff's

vehicles are operated for plaintiff by others under contract and that said vehicles are not operated directly under plaintiff's supervision and responsibility.

13

Exceptions to 19th Finding

Defendants except to the 19th Finding on the following grounds. As pointed out above herein plaintiff's business is not chiefly the wholesaling of used automobiles, but is chiefly a business of transporting automobiles from a place where the price is low to a market where the price is high. There is no evidence that plaintiff sells automobiles for delivery in other parts of California or for delivery in the north Pacific states or that he brings automobiles into California in any appreciable quantities not in fleets. There is no evidence to support the Finding that plaintiff operates upon a small margin of profit and that the fee in question would absorb his net profit and ruin his business or any other business. That said finding is immaterial in any event.

14

Exceptions to 20th Finding

Defendants except to the 20th finding on the ground that said Chapter 402 shows by its terms, and considered with other statutes, that the fee therein required is a tax for the [fol. 61] use of the highways as well as a charge under the state's police power.

15

Exceptions to 21st Finding

Defendants except to the 21st finding on the grounds stated in the preceding exception and because the evidence fails to show that the permit fee of $15.00 per car is arbitrarily fixed and is unreasonable in amount, and the evidence fails to show that the increased cost of policing the highways is comparatively small, but shows the contrary.

16

Exceptions to 22nd Finding

Defendants except to the 22nd finding on the following grounds. To the first sentence, on the ground that the

evidence shows that the supply of used cars obtainable within California is so small as compared with the total volume of used cars sold there as to be negligible, and the evidence fails to show that the license charge in question discriminates against or imposes any hardship on those who deal in used cars obtained from within California. To the second sentence, on the grounds stated in the exceptions to the 20th finding, above, and because it is a conclusion not sustained by any evidence.

17

Exceptions to 23rd Finding

Defendants except to the 23rd finding on the ground that the same does not correctly state the terms of said Chapter 402 and is a conclusion unsupported by any evidence.

18

Exceptions to the 24th Finding

Defendants except to the 24th finding on the ground that [fol. 62] the evidence shows that approximately twenty per cent and not twenty-five percent of all cars caravaned into the state of California are brought in by plaintiff.

19

Exceptions to the 25th Finding

Defendants except to the 25th finding on the following grounds. There is no evidence that there is a considerable transportation wholly within the State of California in intrastate commerce of automobiles on their own wheels, singly, in twos coupled, and in fleets of several for the purpose of sale; the evidence shows to the contrary; the evidence shows that such movement of automobiles on their own wheels for purpose of sale as there is in intrastate commerce within the State of California is so negligible as not to affect the validity of the classification made by said Chapter 402, and that such movement of that character as there is in intrastate commerce is conducted in an entirely different manner than the movement included within the classification made by said Chapter 402. Further that such movements of automobiles on their own wheels wholly

within the State are subject to other license fees for such movements. There is no discrimination against plaintiff in interstate commerce.

20

Exceptions to the 26th Finding

Defendants except to the 26th finding on the ground that there is no evidence to sustain the same.

21

Exceptions to the 27th Finding

Defendants except to the 27th finding on the following grounds. The evidence shows that the definition of "cara-[fol. 63] vaning" made in Chapter 402 in fact includes all those who move motor vehicles on their own wheels upon the highways of California by the fleet and towing method, that the movement of vehicles singly is so negligible in quantity as not to affect the classification made by said Chapter, and that a definite police problem is created by the movement of single vehicles not in fleets moved on their own wheels for purpose of sale and that the movement of four vehicles or less in such manner and for such purpose does constitute a police problem.

22

Exceptions to the 28th Finding

Defendants except to that part of the 28th finding after the semi-colon therein on the ground that if it is a conclusion of fact it is not sustained by the evidence, and that if it is a conclusion of law it is not correct as a matter of law.

23

Exceptions to the 31st Finding

Defendants except to the 31st finding on the following grounds. Said finding consists largely, if not entirely, of conclusions of law, and said conclusions, where they do not consist of recitals of the provisions of said Chapter 402 are not correct. The provision in said Chapter 402 to the effect that the permit fee of $15.00 per car is in lieu of all

other fees means precisely what it says, that it is in lieu of all other fees for the use of the public highways. All other persons moving vehicles upon the highways of California for the purpose of gain, as is plaintiff, are required to pay license fees.

[fol. 64] 24

Exceptions to 32nd Finding

Defendants except to the 32nd finding as an incorrect and unwarranted conclusion, and as being not a finding of fact but a conclusion of law.

Defendants also except to the proposed findings of fact commencing after the 32nd finding of fact under the caption "It is Not True That", as follows:

25

Exceptions to First Finding

Defendants except to the first finding of fact under the aforesaid caption "It is Not True That", on the following grounds. Said Chapter 402 does, as shown by its terms and other statutes, exact a license fee as compensation for the use of the highways.

26

Exceptions to Second Finding

Defendants except to the second finding on the ground that the evidence and plaintiff's bill of complaint affirmatively show that the use of the highways by plaintiff is an extraordinary use for direct gain and profit and as a place of business.

27

Exceptions to Third Finding

Defendants except to the third finding on the ground that the evidence affirmatively shows that the operations of plaintiff and all other persons within the terms of said Chapter 402 are of an unsual or dangerous character.

[fol. 65] 28

Exceptions to Fourth Finding

Defendants except to the fourth finding on the ground that the evidence shows that the vehicle movement included in the scope of Chapter 402 is characteristically and preponderately by the fleet and the tandem-towing method; that the movement of cars singly and not in fleets is negligible; and that such single movement of cars as there is is properly subject by reason of the manner of operation to the terms of said Chapter 402; that the evidence shows that usually there is no tail light lighted on the towed car.

29

Exceptions to the Fifth Finding

Defendants except to the fifth finding on the ground that the evidence affirmatively shows that the business of bringing cars into the State of California on their own wheels for the purpose of sale has caused a special problem of bringing stolen cars and fraudulently registered cars into the State of California.

30

Exceptions to the Sixth Finding

Defendants except to the 6th finding on the ground that the same is incorrect as a matter of fact or law.

31

Exceptions to the Seventh Finding

Defendants except to the 7th finding on the ground that the evidence affirmatively shows that the movement of automobiles from without to within the State of California on their own wheels for purpose of sale has caused law violations and abuses to such an extent as to warrant the Legis-
[fol. 66] lature in enacting Chapter 402.

32

Exceptions to the Eighth Finding

Defendants except to the 8th finding as an incorrect statement of the facts shown by the evidence and as contrary to the evidence.

33

Exceptions to Ninth Finding

Defendants except to the 9th finding as an incorrect statement of the facts shown by the evidence and as contrary to the evidence.

Defendants' Exceptions to Proposed Conclusions of Law

The defendants except to the proposed conclusions of law on the following grounds:

(a)

That chapter 402, Statutes of 1935 of the State of California, is constitutional and does not violate the "Commerce Clause" of Section 8, of Article I of the Constitution of the United States and does not violate the "Equal Protection" and "Due Process" clauses of the 14th Amendment to the Constitution, or any other part of the Constitution.

(b)

Plaintiff's prayer for a permanent injunction against the enforcement of the provisions of said Chapter 402 should be denied.

Defendants except generally to all of the proposed Findings of Fact and Conclusions of Law upon the following [fol. 67] grounds: such Findings ignore the testimony of defendants' witnesses Cato, Martland, Bevins, Walsh, Dillon, and Osborne which is mostly uncontradicted and which covers many matters not touched upon in plaintiff's evidence; the entire record in the case shows that in fact there does not exist any class of operators or any movement of motor vehicles in whose favor any discrimination is made as against the class included in the act; that the included class is properly defined and included in the act because it

presents a problem peculiar to itself alone and not common to non-included classes; that the included class makes a special use of the highways for commercial gain and profit and that the fee charged is a reasonable police power fee and a reasonable charge for the use of the highways.

Wherefore defendants, having filed these exceptions to the proposed Findings of Fact and Conclusions of Law prior to the Court's making or entering any Findings of Fact and Conclusions of Law, pray that the Court allow these exceptions and sustain the same.

Respectfully submitted, U. S. Webb, Attorney General of the State of California, by Frank Richards, Deputy Attorney General of the State of California.

[File endorsement omitted.]

[fol. 68] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed June 8, 1936

The above entitled cause having come on regularly for hearing on the 29th day of November, 1935, at the hour of ten o'clock A. M., before the Honorable Clifton Mathews, Circuit Judge, and the Honorable Albert Lee Stephens and Leon R. Yankwich, District Judges, sitting as a statutory three-judge court, pursuant to section 380, U. S. C. A. (Judicial Code, section 266, amended), Pierson & Block, by Ralph K. Pierson and Samuel P. Block appearing as attorneys for plaintiff, and U. S. Webb, Attorney General of the State of California, by Frank Richards, Deputy Attorney General, appearing as attorneys for defendants; and it having been stipulated that the hearing on the temporary restraining order and order to show cause might be considered, and that the same should be a final hearing of the within cause, and the Court having heard the testimony, and the cause having been submitted, and the Court being fully advised,

[fol. 69] Now, Therefore, The Court makes the following findings of fact and conclusions of law:

Findings of Fact

It is true that:

(1) Plaintiff is a resident and citizen of the City of Los Angeles, County of Los Angeles, State of California; that plaintiff is, and was at all times herein mentioned, engaged in business in said City, County and State aforesaid, under the firm name and style of Pacific Wholesale Automobile Company; that prior to the commencement of this action, plaintiff has fully complied with the provisions of section 2466 of the Civil Code of the State of California with respect to the filing and publication of fictitious firm names.

(2) Defendant, Ray Ingels, is the duly appointed, qualified and acting Director of the Motor Vehicle Department of the State of California; that Russell Bevins was, at the time of the commencement of the within action, the duly appointed, qualified and acting Registrar of the Motor Vehicle Department of the State of California, but has since been succeeded in said office by Howard E. Deems, who is now the duly appointed, qualified and acting Registrar of the Motor Vehicle Department of the State of California; that the defendants John C. Corbett, Fred E. Stewart, R. E. Collins, Orfa Jean Shontz and Ray L. Riley are the duly appointed, qualified and acting members of the Board of Equalization of the State of California, and constitute said Board; that E. Seymour is an agent, servant and employee of the other defendants named herein.

(3) The amount involved in this litigation is in excess of [fol. 70] Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

(4) The California Legislature of 1935 legislated extensively upon the subject of motor transportation. It adopted "The Vehicle Code" and many other acts relating to the subject of motor transportation, including the so-called Caravan Act. (Chapter 402, Statutes 1935). In section 146.5 of the Vehicle Code it provided for the registration of cars previously registered outside of California. Its purpose was to prevent the importation of stolen cars into California. This District Court, sitting as a three-

judge court, declared said section unreasonable, discriminatory and void. These several acts show that the legislature covered the subject of motor vehicle transportation comprehensively and, through separate but related acts, sought to apply its legislative discretion to all conditions it deemed desirable to treat. The purpose of each act is more easily understood and the expressed purpose in each act becomes more definitely a limitation upon its basic theory and purpose through such information.

(5) The so-called Caravan Act (Chapter 402, Statutes 1935) adopted by said Legislature, reads as follows, to wit:

Chapter 402, Statutes of 1935

AN ACT to Regulate the Caravaning of Motor Vehicles Upon the Public Highways of this State, Defining the Term "Caravaning" and Imposing Penalties for Violation Thereof

(Approved by the Governor July 6, 1935, in Effect September 15, 1935)

The People of the State of California do Enact as follows:

Section 1. The term "caravaning" as used in this act shall mean the transportation from without the State of any motor vehicle operated on its own wheels, or in tow of [fol. 71] another motor vehicle, for the purpose of selling or offering the same for sale to or by any agent, dealer, manufacturers' representative, purchaser or prospective purchaser, whether such agent, dealer, manufacturers' representative, purchaser or prospective purchaser may be located within or without this State. The caravaning of motor vehicles as herein defined shall be considered as the transportation of property for hire by motor vehicle and shall be subject to all the laws of this State relative to the transportation of property for hire by motor vehicle upon the public highways of this State.

Section 2. No person, firm or corporation, shall use any highway in this State for caravaning motor vehicles unless and until there shall first have been secured from the Motor Vehicle Department of the State of California a special permit as to each vehicle so caravaned, for use of the high-

ways of this State in caravaning such vehicle, which permit shall be displayed by posting the same upon the windshield of such vehicle or in other prominent place thereon where it may be readily legible. It shall be unlawful to operate three or more vehicles or groups of vehicles in caravan unless a space of at least one hundred fifty feet shall at all times be maintained between each vehicle or group of vehicles being so caravaned.

Sec. 3. As a condition precedent to the issuance of any special permit provided for in the previous section of this act the Motor Vehicle Department of the State of California shall charge and collect a fee of fifteen dollars for each motor vehicle for which a caravan permit may be issued, whether such vehicle be operated under its own power or in tow of another motor vehicle; provided, however, that no such permit shall be issued by said Motor Vehicle Department unless and until the applicant therefor shall have produced evidence to the satisfaction of said Motor Vehicle Department that all of the laws of this State relating to the transportation of property upon the public highways therefor for hire shall have been complied with.

Sec. 4. No permit issued under this act for caravaning motor vehicles or vehicles shall be transferable either as between persons or as to the vehicle for which it is issued, and shall only be valid for the trip or trips to be specified in said permit, and in no event shall such permit be valid for a period of more than ninety days after it shall have been issued. Such permit shall contain such information and be in such form and shall be issued under such rules and regulations as may be prescribed by said Motor Vehicle Department. Such permit shall be conditioned upon the permit-ee complying with all laws of the State of California and the United States.

[fol. 72] Sec. 5. The fee paid for any caravaning permit issued under this act shall be in lieu of all other registration fees and license fees for the use of public highways in this State by motor vehicle during the period that such motor vehicle may be operated under and in accordance with such permit upon the public highways in this State; provided, however, that nothing in this section shall exempt the owner or operator of such vehicle from compliance, except with respect to fees or license charges, with all laws of

this State nor or hereafter adopted, relating to the transportation of property for hire.

Sec. 6. All fees from the issuance of permits collected by the Motor Vehicle Department under this act shall be paid into the general fund in the State treasury.

Said department shall file with the Controller on or before February first and August first of each year a detailed account of the receipts of said Department from this source for the six months next preceding. The moneys so derived by the State are intended to reimburse the State treasury for the added expense which the State may incur in the administration and enforcement of this act and the added expense of policing the highways over which such caravaning may be conducted, so as to provide for the safety of traffic on such highways where caravaning is being conducted.

Sec. 7. Violation of the provisions of section 2 or of section 4 of this act is a misdemeanor punishable by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

(6) The term "caravan" as applied to and used in the act under consideration, is a misnomer and leads to misunderstanding. In a metaphoric sense it has come to mean a considerable number of persons journeying in company by several or many vehicles in company. Fleet movement of cars may with propriety be termed "caravans".

(7) The so-called "Caravan Act", although including fleet movement of cars, is not limited thereto. It defines the term "caravaning" as the movement of a single car into California upon its own wheels for the purpose of sale. A tax upon such a single car movement, not in a group or fleet, is one of the specific complaints in this case. [fol. 73] There is nothing in the act that even refers to caravaning as that term is commonly understood, except that not more than three "vehicles or group of vehicles" can be operated legally upon the highways unless spaced one hundred fifty feet apart. This provision applies only to cars for sale that are driven over the highways into California upon their own wheels. There is nothing in the act indicating that the legislature has determined that the

practice of bringing cars into California on their own wheels for the purpose of sale is undesirable or that the wording of the act is intended to prevent, limit or regulate the practice, except as to the specific above mentioned.

(8) There is no police problem resulting from the use of the highways by a single vehicle driven into the State of California on its own wheels for the purpose of sale, and there is no police problem created by such movement differing from the police problem created by any other movement of a single vehicle for any other purpose.

(9) The fleet movement, where made up of more than four automobiles, causes certain traffic difficulties, such as passing the fleet and meeting cars while passing it. In practice it has been shown that the fleet would sometimes stop, affecting the flow of traffic. Where motor police would stop a car in the fleet, those following would sometimes drive so as to interfere with other traffic. The drivers were not always careful as to their automobile lights and the leader car sometimes swayed. Some of the drivers were unfamiliar with the California traffic regulations and some were fatigued. Each and every one of these incited difficulties illustrate rare exceptions rather than rules.

(10) The defendants ever since the fifteenth day of Sep[tol. 74] tember, 1935, have demanded that plaintiff, before bringing his automobiles into the State of California, obtain a special permit for each and every vehicle and to pay for each of such permits the sum of fifteen dollars.

(11) Plaintiff's sole occupation is that of a dealer in automobiles, and he is engaged in the business of buying and selling and trading of automobiles and he has been engaged in such business for more than four years last past, and has succeeded in building up a business, the value of which is in excess of twenty-five thousand dollars, and from which he has derived a good income and livelihood. Plaintiff has complied with the laws of the City, County and State in which he resides, relating to such business.

(12) Plaintiff, in the occupation and conduct of his said business as an automobile dealer, purchases motor vehicles of the ordinary pleasure, or private passenger type only, in the States of Texas, Louisiana, Arkansas, Tennessee, and other southern and eastern States, and drives them from

the point of purchase to [illegible] place of business in the City of Los Angeles, State of California; all of said vehicles are licensed and registered in the State where purchased.

(12) At the time plaintiff purchased said automobiles and during the period said automobiles are so driven from said points of purchase in other States to the said place of business of plaintiff in Los Angeles, California, plaintiff is engaged solely in interstate commerce.

(13) The purchase of said automobiles by plaintiff as aforesaid is essential and necessary to the continued conduct of his business, and if he is deprived of the right to purchase and drive said automobiles into the State of California and over the highways of said State to his place of business in the City of Los Angeles, for the purpose of sale, and of the right of selling the same, as will have his business and the value thereof irreparably injured.

(14) On or about the [illegible] day of September, 1933, the plaintiff purchased a 1933 Studebaker Sedan motor vehicle in the City of Shreveport, State of Louisiana, bearing 1933 Louisiana License number [illegible], and a 1934 Oldsmobile coupe motor vehicle in the City of Tyler, State of Texas, bearing 1933 Texas license number [illegible]. Immediately thereafter he caused said automobiles to be driven to the State line of California, near Blythe, California, in the manner following, to wit: he caused the said Sedan motor vehicle to be driven under its own power and on its own wheels, and caused the said Oldsmobile coupe motor vehicle to be towed on its own wheels attached to the rear of said Sedan motor vehicle.

On or about the [illegible] day of September, 1933, plaintiff purchased a 1934 Dodge Sedan motor vehicle in the City of Tyler, State of Texas, bearing 1933 Texas license number 865530; thereafter he caused said motor vehicle to be driven to the State line of California, near Blythe, California, in the manner following, to wit: he caused the said motor vehicle to be driven under its own power and on its own wheels.

(16) The specific complaints in this case are that the demand for a license fee of fifteen dollars for driving a single motor vehicle, not by float or ground, across the California line from Arizona; and second, the demand for

a license fee of thirty dollars for so driving a motor vehicle with another motor vehicle attached and not in fleet or group movement.

[fol. 76] (17) The defendants refused to permit plaintiff's said automobiles to enter the State of California unless and until the plaintiff should first procure of the Motor Vehicle Department of the State of California a special permit as to each of said vehicles, and pay a fee of fifteen dollars for each of such permits.

(18) The plaintiff is the sole owner of the motor vehicles which he brings into the State of California, and he is not engaged in the business of transporting property for hire. Said vehicles are operated directly under his supervision and responsibility, and not under contract.

(19) Plaintiff's business is chiefly the wholesaling of used automobiles; he sells automobiles for delivery in other parts of the State of California, and a smaller number for delivery in the North Pacific States. He buys automobiles and brings them into California singly, and by twos coupled, and sometimes in fleets of several. Although he has been operating in this manner for several years, no traffic trouble has occurred in connection with his said activity. Although plaintiff's business is large and lucrative, he operates upon a small margin of profit, and the fifteen dollar permit fee for each automobile he brings into California would practically absorb his net profit and would ruin his business, and a large part of the used car business in California.

(20) Chapter 402, Statutes of 1935, does not contemplate or provide for the collection of the fee therein mentioned for the use, construction, maintenance or repair of the public highways. Such fee, as is specifically provided in the Act, is solely for the purpose of reimbursing the State treasury for the added expense which the State may [fol. 77] incur in the administration and enforcement of the act and the added expense of policing the highways over which "caravaning" may be conducted.

(21) The permit fee of fifteen dollars per car required by said Chapter 402, Statutes of 1935, is arbitrarily fixed and is unreasonable in amount. The increased cost of policing the highways caused by the movement of automo-

biles on their own wheels from without the State of California to within the State of California for the purpose of sale is comparatively small and does not justify the excessive and unreasonable amount of the fee, and would be amply met by a license fee of less than one-third the amount charged.

(22) The unreasonableness of the license charge discriminates against the plaintiff who brings cars into the State for sale in favor of those who deal in used cars obtained from within the State of California. The charge bears no reasonable relation to the purpose for which it is collected and in practical effect constitutes a protective tariff and is unconstitutionally burdensome.

(23) The fee permits only limited movement, and is valid only for the trip or trips to be specified in said permit and in no event is the permit valid for a period of more than ninety days after it shall have been issued.

(24) The plaintiff has been engaged in the business of bringing automobiles into the State of California on their own wheels for the purpose of sale for the past four years or more; that he brings into the State of California approximately between twenty and twenty-five per cent of all the cars brought into the State on their own wheels for the purpose of sale; and that during that period none of [fol. 78] plaintiff's drivers have been arrested, and none of his automobiles have been involved in any traffic accident.

(25) Between thirty per cent and forty per cent of such imported cars are driven to and across the California state line and upon the public highways of the State of California, upon their own wheels and for the purpose of sale, singly, and not in company with other automobiles.

(26) There is considerable transportation wholly within the State of California in intrastate commerce of automobiles on their own wheels, singly, and in twos coupled, for the purpose of sale. Under the provisions of said Chapter 402, such movements of automobiles wholly within the State are not subject to the said fifteen dollar fee, and there is no other law of the State of California imposing a similar or other fee for such movement in intrastate commerce.

(27) The classification created by said Chapter 402, Statutes of 1935, is based upon the following; first, that the vehicle be on its own wheels; second, that such vehicle come from without the State of California into the State of California; and, third, that the vehicle be for sale. These three elements and acts in and of themselves are legal, but when joined together, by virtue of said Chapter 402, become illegal unless the permit fee is paid and the route of travel specified, and such permit is valid not to exceed ninety days in any event. The basis of such classification has no relation to the purpose of the act, to-wit, the regulation of "caravaning" as defined in the Act. Although including fleet movement of cars, which may with propriety be termed caravaning, it is by no means limited thereto, but defines the term "caravaning" to include the movement of a single [fol. 79] vehicle and to groups of vehicles less than five upon their own wheels into California to be sold. No police problem is created by the movement of a single vehicle in such manner and for such purpose. That the movement of four vehicles or less in such manner and for such purposes constitutes no police problem.

(28) The plaintiff is not a common carrier, accepts no article for transportation for hire and transports only his own property.

(29) The defendants intend to and will enforce the provisions of said Chapter 402, Statutes of 1935, unless restrained from so doing.

(30) The plaintiff has no plain, speedy or adequate remedy at law.

(31) While there is a provision in said Chapter 402 to the effect that the licensing fee of fifteen dollars per car is in lieu of all other fees, this provision is meaningless and of no benefit to the plaintiff. Such provision merely exempts the importing car operator from paying fees required of carriers defined and provided for in the other motor vehicle acts. But there is nothing in any act that requires the payment of any such fees by plaintiff or persons in like circumstances. The purchaser of the imported car must pay the regular State automobile license fee and must pay the property taxes placed upon the car in the same manner and to the same extent as any other car purchaser pur-

chasing a car obtained from within the State and which car has not been brought from without the State in the manner contemplated by said Chapter 402.

(32) The enforcement of the provisions of said Chapter 402, Statutes of 1935, will deprive plaintiff of rights guar- [fol. 80] anteed to him under the "Commerce Clause" of Section 8 of Article I, and under the "Equal Protection" and "Due Process" Clauses of the 14th amendment of the Constitution of the United States.

It is not true that:

(1) That Chapter 402, Statutes of 1935, exacts a license fee as compensation for the use, construction maintenance or repair of the public highways of the State of California.

(2) That the use of the highways of the State of California by the plaintiff is an extraordinary use or for direct gain or profit, or as a place of business.

(3) That all vehicles brought into the State of California on their own wheels for the purpose of sale are moved in fleet or by the tandem-towed method; that usually there is no tail light on the towed car. More than fifty (50%) per cent of such cars are moved in fleet.

(4) That many stolen cars and cars with fraudulent registrations are brought into the State of California by persons engaged in the automobile business and in the business of bringing cars into the State of California on their own wheels for the purpose of sale.

(5) That, without the so-called caravan act, said vehicles could move over the highways of the State of California without registration and without identification.

(6) That the movement of automobiles from without the State of California into the State of California on their own wheels and for the purpose of sale have resulted in many law violations and abuses, as compared with other operations of automobiles, or that such movement usually or [fol. 81] ordinarily results in law violations and abuses.

(7) That the towed vehicle usually or ordinarily swings or skids or fails to follow the towing car on curves, or at all, except as affirmatively stated in these findings.

(8) That the drivers of such vehicles become careless or that the manner or method of driving said vehicles is in any manner different from that in which other vehicles of like character are driven or towed, or at all except as is affirmatively stated in these findings.

CONCLUSIONS OF LAW

Chapter 402, Statutes of 1935, of the State of California, is an unconstitutional exercise of legislative power, and is, therefore, void, as violative of the "commerce clause", and of the "equal protection" and "due process" clauses of the Fourteenth Amendment of the United States Constitution; and that the plaintiff herein is entitled to a permanent injunction against the enforcement of the provisions of said Chapter 402, Statutes of 1935, of the State of California.

Dated at Los Angeles, California, this 6th day of June, 1936.

Clifton Mathews, Circuit Judge. Albert Lee Stephens, District Judge. —— ——, District Judge.

[File endorsement omitted.]

[fol. 82] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

In Equity. No. 759-S

HOWARD MORF, Doing Business under the Firm Name and Style of Pacific Wholesale Automobile Company, Plaintiff,

vs.

RAY INGELS, as Director of the Motor Vehicle Department of the State of California; Russell Bevins, as Registrar of the Motor Vehicle Department of the State of California; John C. Corbett, Fred E. Stewart, R. E. Collins, Orfa Jean Shontz and Ray L. Riley, as Members of the State Board of Equalization and Constituting Said Board in the State of California; and E. Seymour, Defendants

DECREE FOR PERMANENT INJUNCTION—Filed June 8, 1936

This cause came on to be heard on the 29th day of November, 1935, and was argued by Counsel, and thereafter submitted; and upon consideration thereof,

Now Therefore, it is Ordered, Adjudged and Decreed, vis:

1. That the defendants, Ray Ingels, as Director of the Motor Vehicle Department of the State of California, Russell Bevins, as Registrar of the Motor Vehicle Department of the State of California, John C. Corbett, Fred E. Stewart, R. E. Collins, Orfa Jean Shontz, and Ray L. Riley, as members of the State Board of Equalization and constituting said Board in the State of California, and each of them, and their agents, servants and employees and all other persons acting under, through or by authority of them or either of them, or by virtue of their said office, be, and they hereby are jointly and severally enjoined and restrained, specifically and absolutely from enforcing against the plaintiff [fol. 83] herein the provisions of Chapter 402, Statutes of 1935, of the State of California.

2. That the bonds heretofore given by plaintiff herein under the temporary restraining order be, and the same are hereby exonerated.

Defendants, and each of them, are granted exceptions.
Dated June 6th, 1936.

Clifton Mathews, Circuit Judge. Albert Lee Stephens, District Judge. Leon R. Yankwich, District Judge.

Decree entered and recorded June 8, 1936. H. S. Zimmerman, Clerk, by Theodore Hocke, Deputy Clerk.

[File endorsement omitted.]

[fol. 84] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDERS SUBSTITUTING PARTIES DEFENDANT—Filed July 20, 1936

It is Hereby Ordered that H. E. Deems be substituted in the place and stead of Russell Bevins, as a defendant herein.

Dated July 20, 1936.

Albert Lee Stephens, Judge.

It is Hereby Ordered that Ray Edgar be substituted in the place and stead of Orfa Jean Shontz, as a defendant herein.

Dated July 20, 1936.

Albert Lee Stephens, Judge.

[File endorsement omitted.]

[fol. 85] In United States District Court

[Title omitted]

Statement of Evidence—Filed October 7, 1936

For the purpose of completing the record in the above entitled cause respecting the proceedings had therein in the District Court of the United States for the Southern District of California, Central Division, and to enable the parties to have said proceedings, and the judgment, orders and decree entered therein reviewed on appeal, the Court does certify that the following proceedings were had in said cause.

Be it Remembered that the above entitled cause came on regularly for hearing on the 29th day of November, 1935, at the hour of ten o'clock A. M., before the Honorable Clifton Mathews, Circuit Judge, and the Honorable Albert [fol. 86] Lee Stephens, and the Honorable Leon R. Yankwich, District Judges, sitting as a statutory three-judge court, pursuant to section 380, U. S. C. A. (Judicial Code, Section 266, amended) upon plaintiff's application for an interlocutory and permanent injunction, Pierson & Block, by Ralph K. Pierson and Samuel P. Block, appearing as attorneys for plaintiff, and U. S. Webb, Attorney General of the State of California, by Frank Richards, Deputy Attorney General of the State of California, appearing as attorneys for defendants, and the following evidence was received, to-wit:

Walter M. Walsh, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

I am a California Highway Patrolman and have been such for five years and four months. I am stationed in

Imperial County, my headquarters being at El Centro. I patrol the highway in an area from Brawley to the Trifolium truck inspection point, about sixteen miles from Brawley. The highway I patrol is known as U. S. 99 or State Route 26, and it crosses into Arizona at Yuma.

In carrying out my duties, I have come in contact with caravan cars, on my beat, on one or two occasions while going to the office to make out my reports.

There are approximately ten to forty cars in a caravan. In enforcing regulations relative to caravan cars, I make as good a check as I can as to their lights, and on most every occasion I have to stop them where they were following too closely and send them out at a safe distance so that if there were any cars that wanted to pass, they could do so without causing any wrecks.

I have come in contact with the drivers of these cars and [fol. 87] only on rare occasions are they residents of this state, and the residents of California are the ones in charge of the caravan, and their assistants. There is a man in charge of the caravans who runs back and forth and acts as a "Trouble Shooter". These drivers commit violations of the traffic laws of this State in driving the cars. At the Trifolium truck inspection point, there is an Imperial County Deputy Sheriff inspecting outgoing freight and a United States Border Patrol Inspector. The station is well lit up and there are lighted signs from three hundred feet south to the station. The Patrol Inspectors and I get out with flashlights, and flag down the first car in the caravan, but the rest of the cars go to the right and left on the wrong side of the road in front of oncoming traffic, causing such traffic to forfeit its right of way and drive on the shoulder of the road. No more than one car is ever hitched on as a trailer. The lights on the cars are never up to what they should be. Last Saturday at seven o'clock, there was a caravan going through, with stickers on the windshields which I believe said "Pacific Wholesale Auto Company". I passed by and stopped the one in front. He was rather slow about stopping, and apparently didn't know what a siren was. I got him over on the side of the shoulder, parked in front of him, and started to write out a light car-, and I looked back, and there were six of them parked on the highway and before I could get the situation under control, there were two trucks and trailers blocked on the highway. I estimate there were about 34 cars in

that caravan. Eight of these cars were travelling about 35 feet behind the car in front.

When one vehicle is towing another, in some cases they are tied bumper to bumper. This, in making a turn, causes the car in front to pull, to make a wide turn, not giving the [fol. 88] safe operation there would be if there were a tow bar, or a tow chain, with somebody in back. I do not think this would affect traffic coming in an opposite direction unless it causes the driver to drive on the left hand side of the road. They do not have chains in connection with the tow bars.

The general way of equipping the cars for towing outside of being connected with bumpers, is to have a type of bar which is fastened on to the front car and then, I believe, is fastened on to the axle and there is a connection that goes back to what I believe is called the radius rod. About forty per cent (40%) of those cars that I have had to stop have been on account of the car behind whipping, swaying from one side to the other and on many occasions crossing the center line. I stop them and make them tear it down and do not let them start until they have passed inspection. A safety chain is required under the traffic law. Some of these tow cars have safety chains and some do not. I have insisted on chains, but I have never had much success with it.

With respect to the amount of time I spend in checking the caravan cars as they come in: I patrol what is called a congested area. To enumerate one particular night, last Saturday night, I spend 57 minutes in one spot. The trouble shooter apparently was ahead for he did not appear. I then went on to the inspection point, which is the end of my congested area, and they "ganged up" when they were flagged down. I told them the distance they should keep, and I had to take one hour and ten minutes to go beyond my congested area to keep the road clear for oncoming traffic. I followed these caravan cars for a distance of from 20 to 30 miles. I have never given any of these drivers a citation for violations of the traffic laws. I can't [fol. 89] get a proper address when they are non-residents. I instructed them as to what they should do in order to abide by the laws. I noticed several of these caravans carrying passengers. I have noticed four or five cars with five people, three in the back seat and one beside the

driver. I have noticed women carrying children, little children too small to walk.

I have not counted any accidents on my beat by reason of these caravans, relative to private cars.

[fol. 90] The conditions which I have described are typical of the conditions which I have observed during the period I have been employed upon that highway, extending back for a year and a half. I can recall a caravan of Studebakers, new cars, coming through from South Bend, Indiana for delivery in San Diego which was an exception. It differed from the typical condition I have described in that the cars followed at a safe distance from each other, kept on the right side of the road, had tow bars with the safety chain, good lights and good experienced drivers. Many times I have had to stop caravans to make them put in operation the lights on the rear of the towed car.

Cross-examination:

I have been on the beat I mentioned for five years, and have observed caravanning on that beat for about a year and a half. It might be that caravanning has been conducted over U. S. Highway 99 for the past five or six years. In the last year and a half, about two caravans per month have been called to my attention. I have never given a citation to any driver of any caravan. I have observed there is a man in charge of every caravan, but I have never given him a citation, although in practically all instances the man in charge is a resident of the State of California. I have the power to arrest a person for the violation of the California Motor Vehicle laws and take him before a magistrate. On the occasions which I spoke of, last Saturday, where I found numerous violations of the Motor Vehicle laws, I did not give a citation, nor did I take the driver before a magistrate.

In all instances that I observed caravans, there have not always been a car hitched to another automobile, but there would be one or two where they would be towing another [fol. 91] car. I do not know how many automobiles, single, without any cars towed to them, or attached to them, come over my beat in any single day.

It is possible for a single automobile to be brought in from Arizona, into California, for the purpose of sale, by

itself, in the ordinary lane of traffic, and I would have no particular occasion to know that such automobile was brought into the State of California for the purpose of sale, unless I stopped it, and I would not stop it unless there was a violation of some of the laws of the State of California, any more than I would stop any other car except for a traffic violation.

If a car is brought into the State of California from the State of Arizona, alone, not towing any other automobile, and for the purpose of sale in California, there would be no more danger or hazard created on the highways of California than if the same automobile were driven into California because the driver intended to move in and live in California, providing the laws in each case were observed. In enforcing the laws of the California Vehicle Act, it makes no difference to me where the cars come from or where they are going, so long as they observe the law. The minute I notice a violation of the law, it is my duty to stop it, and the fact that the cars come from without the State makes no difference. If these automobiles were started from Holtville, California, and driven to San Francisco, California, they would be just as much a hazard on the road if driven in exactly the same manner as those coming from without the State, if they had incompetent drivers and they violated the laws. If these cars were towed together in exactly the same manner as cars from without the State of [fol. 92] California, they would react in exactly the same manner. The California Vehicle Code provides for safety chains between automobiles, and this is a recognized standard principle for towing vehicles in California, and it is permissible and lawful. I do not know of any law that prevents an automobile from towing another automobile. I arrest violators of the Motor Vehicle Act, and also give some a warning and let them go. With respect to the approximate number of citations I issue, in one month: we have an officer's stop card that we fill out, we have a truck report card, and our citation book. In the month of October I issued about 28 citations and made about 112 light stops and about 100 other stops; that would be about 212 stops in 28 citations, or a little better than one-eighth. Sometimes it runs less and sometimes more than that in a month.

These cars that are brought in from without the State of California for the purpose of sale, which is termed caravanning, are stopped at the border. I have not observed a California permit on any of these cars. They are stopped at the border by a branch separate from ours. The California Highway Patrol, of which I am a member, has to do with the enforcement of the laws governing the operation of motor vehicles. They have a branch separate from ours over there, a registration office, which takes care of stopping the cars.

RAY B. DILLON, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

I am a traffic officer of the State of California, with the California Highway Patrol, and have been such an officer for approximately eight and one half years. I police twenty miles east of Banning, and west to the San Ber- [fol. 93] nardino County line which is 14 miles west of Banning. The name of the highway which I police is California Highway No. 26, or U. S. Highway 99. I have come in contact with the caravanning of motor vehicles clear across my territory, and I have observed the manner in which said cars are driven, and the character of such cars. I have observed violations of the Motor Vehicle Act of the State of California by the drivers of these caravan cars. The violations which I have noticed are, following the preceding vehicle too closely, no safety chains between the vehicles, driving in the center of the highway, passing other vehicles without sufficient clearance between vehicles approaching, no tail lights, glaring headlights, and operators of vehicles having no California operator's license. The average number of cars in a caravan is from eight to thirty or thirty-five cars. I have issued citations to drivers of those cars approximately six or eight times, and they have not appeared in Court on those citations. I have made arrests and thereafter taken them into court instead of giving citations.

E. Raymond Cato, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

I am and have been ever since the 8th day of January, 1931, Chief of the California Highway Patrol. My duties are to administer the affairs of the organization, lay plans and direct enforcement as prescribed by the Motor Vehicle Code.

Caravaning of automobiles into the State of California has required additional supervision of traffic on the highways of the State and the assignment of additional officers to border counties and highways leading into the State [fol. 94] from other states. It has also required additional clerical work to handle warrants which lie dormant and which were issued for caravan drivers.

In the years 1931 and 1932 particularly, caravaning of motor vehicles into the state was called to my attention by complaints from citizens. Committees of citizens called on me in Sacramento and insisted that we stop caravaning. We could find no law to stop it, so we made a check-up to see what caravaning was, as I was unfamiliar with it at that time. We found fleets of automobiles being towed into the state. Citizens complained that they were a hazard on the highways and were dropping itinerants into the State of California. The matter was brought before the last session of the legislature, and I appeared and testified before a committee of the legislature.

[fol. 95] In January or February of this year (1935), I assigned three additional highway patrolmen to Imperial county, two to Riverside county, four to San Bernardino county, and one to a territory in Nevada county east of Truckee. Since then I have assigned additional men who were appointed only a few days ago, i. e., two additional men to Nevada county, two to Placer county, one district inspector to the southern portion and one to the northern portion of the state. I appointed the district inspectors for the purpose of coordinating the work between the traffic officers and the superior officers in those communities. The appointment of the district inspectors was on account of caravaning, but the assignment of additional officers was not entirely due to caravaning, but to the increase of traffic in recognition of caravaning, that is, we found great fleets of cars coming through and at this time there was no caravan law requiring them to travel fifty feet apart and

wrecks were reported. We had numerous complaints from citizens being crowded off the highways.

With regard to the condition which existed just preceding the passage of the act and the peculiar hazards or dangers attending the practice of caravaning at the time of and just prior to the passage of the act, maybe I can better explain it this way: If we have caravans of people who wish to go from place to place we assign a traffic officer, from one to three men to see that they move with expedition and safety. These caravans coming in have no one to govern them coming into the state, and we put an extra patrol on the highway to see that there is safety on the highway, not alone by reason of the fact that there was a caravan coming in, but the increased traffic on the highway. I am now [fol. 96] speaking of a condition that existed prior to the 6th day of July, 1935.

From the first of the year (1935) until the 6th day of July, 1935, when the Act was passed, I put on approximately six additional men over the whole state because there were caravans on the road. They get a salary of $170.00 per month. If the caravaning business were entirely eliminated these men could be dispensed with on these routes. I would not dispense with their services. I would move them to other locations to work because I need more men. I had to assign an additional captain to the northern territory within the last two weeks also. There are three men whose specific duty is the enforcement of this law; that is, since it was in effect.

Our budget appropriations, if I can recall exactly, was $1,488,000.00 in the 84th fiscal year, which was July 1932, to June, 1933, and the 87th fiscal year was $2,447,000.00 and something, showing a considerable increase due to the increased traffic throughout the state.

It would be almost an impossible task to segregate and say what was due to caravaning. But I have noticed the increase in caravaning the last few years which we hadn't observed previously. In the last year there were approximately 14,000 cars caravaned into the State of California.

The caravans I observed, during the time of the investigation, ran train-like—in other words, they wouldn't permit traffic going in the same direction to pass and caused a hazard from traffic coming from the opposite direction from those who would take a chance to pass. The drivers

of caravan cars do not drive at approximately the maximum speed as resident drivers, I cannot say why. They are unfamiliar with California rules of the road, at least [fol. 97] not observing in some instances and the fact that they drive closely together, and towing another car, creates an additional hazard. If they drive fast in swinging about it creates an additional hazard on the road. These were some of the conditions which lead to the assignment of additional men, and I anticipate putting on more men. None of the six additional men we put on were because of the Caravan Act, but the six men were necessitated by the condition itself prior to the enactment of the Legislature. Since then we have put on additional men to try to enforce the Act. We have employed no additional clerical help in my department because of caravanning of cars into the State, but additional clerical help have been assigned to that particular duty.

There is no caravanning of cars from within the State to without the State to my knowledge. There is transportation of cars where they haul them, and there is some caravanning of cars within the State from place to place, but it is small. I have seen a few new cars moved from place to place.

Cross-examination:

I have observed some caravanning of automobiles within the state. I wouldn't know definitely, upon seeing a caravan on the highway, which cars were being taken from Los Angeles to San Francisco for the purpose of sale, but I have been at their places of business and have seen the drivers bring them in and heard them say where they were from. I don't know how many of those cars were transported from Los Angeles to San Francisco for the purpose of sale. It would not be a hundred or two hundred a day.

The regulation passed by the legislature of safety chains and the clearance distance of 150 feet helps considerably to lessen the hazards which I have mentioned.

[fol. 98] Before and at the time I joined the department, caravanning was being carried on in the State but I was not familiar with it. However, I soon learned about it. A representative group of the Chamber of Commerce called on me at my Los Angeles office. The basis of their objections was itinerants, principally. There is nothing in the Caravan statute which refers to itinerants.

The pick-up in business and new automobiles being faster and more modern are contributory causes to increased hazard on the highways, not alone on the highways where caravans come in, but on all highways; also, the increase in hauling, trucks, et cetera. All this has considerable to do with it. I have observed, when out on the road, big oil trucks and various other types of commercial vehicles that had trailers behind them.

At the hearing before the legislative committee, I gave facts principally regarding itinerants into the state, and not so much at that time about caravanning, but it led into caravanning. At first the legislature intended to stop caravanning altogether and not to regulate it because it was found directly responsible for bringing an influx of itinerants into the state. In my opinion, that was the real object or one of the real objects, of enacting the Caravan Act, and then the hazard naturally was brought out by the fact of accidents and other contributory factors. The facts I have testified to here about the increased hazard on the roads are the same in character as the facts I testified to before the legislative committee.

There is a serious condition on the road because of caravans, so far as safety is concerned. I would like to [fol. 99] put sufficient patrols to escort every caravan to its destination so as to regulate the movement on the highway with safety to others. I do that for every other sort of caravan that moves over the highways, for any civic organization of any legitimate purpose. We treat caravans the same as parades, and five cars in a caravan should have some one to regulate it. My experience has taught me that if a large number of cars are to be moved, they should be held until a group of 25 or 30 cars is formed and they have three officers relaying with them through the country.

If only three cars were brought in and spaced two or three hours apart, there would be less hazard, and the condition created by three cars would be negligible, depending on the time of arrival, ability of the drivers, and condition of equipment. Four or five cars would constitute what might be termed a parade, so that oncoming traffic cannot pass around them, and therefore makes it necessary to put a regulator there. The only other effective way to handle such a parade other than to have an officer or officers to conduct the parade to its destination is to space the cars.

Two cars to one driver, and sometimes the driver is crowded with passengers, makes it unsafe.

Before the Caravan statute became effective, we regulated caravaning to some extent, so far as ordering the drivers to keep a certain distance from one another, but caravaning did not come over night. This business has grown to where we must take cognizance of it. Previous to the year 1933, we didn't do anything about it. Then we first began to assign additional men. It was definite last winter that we must do something about caravaning.

[fol. 100] In my opinion, when there are four or five cars together, it becomes a hazard. It is true that an automobile, whether driven alone or with another car, if driven by a person who is reckless, or by a person who does not know how to drive properly, is a menace on the highway.

If the plaintiff Morf was bringing in 25 cars into the State of California, and brought them in singly, three or more at a time, with a half hour elapsing between each group, that would not create a hazard if he were the only one doing it. This applies to trucks on the highways. Too many necessitates control by assigning men to handle them. I have assigned six men to handle it (caravaning).

R. W. MARTLAND, JR., called as a witness on behalf of the defendants, being duly sworn, testified as follows:

I am and have been, since the year 1922, editor of an automobile trade paper. From the summer of 1933 until the present time, I have made a personal investigation of caravanning of automobiles into the State of California, and appeared before the legislative committee which was considering the passage of the act known as the Caravan Statute. Most of the caravans originate in Detroit, South Bend, and Kenosha, Wisconsin. I have followed them through Utah, Nevada, and into California, and in California. The new cars, for the most part, run in caravans ranging from ten to as high as fifty automobiles, one car towing another. The general apparatus used in towing a car is a tow bar, and in some cases, chains are used.

I appeared before the legislative committee relative to the passage of the law covering this subject of Caravaning in March, 1935, upon the invitation of Senator Hornblower

[fol. 101] and the Motorcar Dealers' Association of San Francisco.

I told the legislative committee that in my opinion, formed from my observations, the way caravans were coming through northern California, where I mostly observed them, constituted a very definite traffic hazard, particularly over the Sierra Nevada mountains; that the condition of the drivers generally was one of considerable fatigue by the time they reached California because of the fact that they were working long hours; that the general caliber of the drivers was poor inasmuch as they were transients picked up from newspaper ads in Detroit, South Bend and other places; that California automobile plants employed several thousand men and that caravanning, from an economic standpoint, was very definitely a threat to local employment, in addition to which it was bringing in a number of transients. I also pointed out, in a check made by Mr. Bevins and Mr. Cato earlier in the year, that we had uncovered a number of fraudulent representations of caravanned cars, and that from the standpoint of ethics it was encouraging a very deplorable condition in the marketing of automobiles in this State. My idea in representing these facts was to prevent caravanning entirely, or to regulate it in a manner particularly with reference to registration and control on the highways. The purpose was to reduce caravanning by regulating it, as that would have been the probable effect. These matters which I related to the committee of the Legislature, I still believe to be true and correct, and I testify to the Court now as I testified before the committee. By fraudulent representations. I mean that these cars, which we checked, were represented as new cars to the purchasers, where they had actually been carvanned across the country, and four or five dealers had altered the bills of sale [fol. 102] in 212 cases so that the purchasers had no way of knowing that the cars had been used.

Cross-examination:

When the bill was first discussed, the fee was $50.00 and later cut to $15.00.

Redirect examination:

From my observation there is not a great deal of caravaning of automobiles from within the State to without the

State of California, and from my discussions with dealers and knowing the origin of their cars, there is comparatively limited movement of caravans from one place within the state to another place in the state.

In the caravanning from one point to another point in the state they do not run the cars together like the caravanning of cars from without the state to within the state. Cars that are moving to more favorable markets, such as from Los Angeles to San Francisco, what little movement there is, are driven singly and usually by employees of the dealers, that is, men who work for the dealers. I can't say I have ever seen a convoy of cars moving intrastate. I don't say it doesn't exist, but I have never seen it. So far as I know, they would drive them one at a time and not in a train of cars.

Recross-examination:

I have never gone into plaintiff's place of business and inquired about the number of cars he has sold to dealers in San Francisco or how many cars were transported there from his place of business in Los Angeles. I have gone into places of business of persons buying and selling cars in San Francisco, but not in Los Angeles. The cars are not sent from San Francisco to Los Angeles, but are sent [fol. 103] from Los Angeles to San Francisco. If I saw ten or twelve or fifteen cars going down the highway on the inland route from Los Angeles to San Francisco, I can't say that I would know whether those cars were being transported to San Francisco for the purposes of sale or not.

Russell Bevins, one of the defendants herein, called as a witness on behalf of all defendants, being first duly sworn, testified as follows:

I am registrar of the Motor Vehicle Department of the State of California. From the 1st day of January, 1934, to the 1st day of January, 1935, there were caravan-ed into the State of California 9,663 automobiles, and from January 1, 1935, to November 29, 1935, 14,000 automobiles. The administration expense of issuing caravan permits is about $5.00 for each permit.

The salary of a traffic officer begins at $170.00 per month and increases with his term of service over a period of from three to five years up to ten years, to a maximum of $225.00 per month.

Before the Caravan Statute was passed, cars were sold in California as new cars where they had been caravanned across the states, which is now greatly eliminated by the statute. The border man, or traffic officer, determines whether or not it is a caravan car, and we keep a record of every car that is caravanned into the State of California, which eliminated to a great degree the bringing into the State of stolen cars. Without the Caravan Statute a car could be driven into the State, it plates destroyed and application could be made for a new car registration. No check is made of the car upon such application, for we assume the statement to be true that it is a new car and [fol. 104] base the issuance of a certificate of registration upon such statement. With a caravan car permit, that will be entirely eliminated. In order to administer the Caravan Statute we will have to increase our clerical help in addition to Chief Cato's increase of traffic officers in the Highway Patrol. The additional clerical help will be employed at the border stations, at Sacramento and branch offices. Up to October 31st of this year, approximately 1,960,000 pleasure cars have been registered in the State of California, and the registration is $3.00 per car, so that we have a revenue of approximately $6,000,000.00 from this source. But the mathematical answer doesn't take into account that for expenses we are allowed only 35% of every $3.00 by statute. In addition to the said $6,000,000.00, there is placed in the Highway Department certain other funds which are derived from various sources.

The Caravan Statute was taken from the Motor Vehicle Department of the Legislature and placed either in the revenue and taxation committee or the government efficiency and economy; one or the other. Harry Riley is chairman of the revenue and taxation committee. It is my recollection that the bill was finally passed out of his committe.

LAWRENCE C. OSBORNE, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

I am rate clerk with the Santa Fe Railway. The freight charge for bringing an ordinary, medium-sized sedan car from Detroit to Los Angeles would be about $150.00. The freight rate from Yuma, Arizona, to Los Angeles, is $1.22 per hundred, with a minimum of 10,000 pounds, making a minimum charge for handling $122.00. From Topok the minimum is $139.00.

[fol. 105] Cross-examination:

The rate from San Diego to San Francisco is 84½ cents per hundred pounds for the same minimum, plus a railroad emergency charge amounting to 70% of the total freight charges.

HOWARD MORF, the plaintiff herein, called as a witness on his own behalf, being first duly sworn, testified as follows:

I am engaged in the business of buying and selling automobiles at wholesale. My place of business is located at 616 W. 18th Street, Los Angeles, California. In my said business, I purchase automobiles from time to time in other parts of the country and drive or cause said automobiles to be driven to my place of business at Los Angeles.

In the operation of my business, approximately thirty percent (30%) to forty percent (40%) of the automobiles are driven into the State of California alone, as a single unit, with one driver driving an automobile, and the balance are brought into this state with one automobile towing another.

When I speak of bringing cars in, and thirty percent (30%) or forty percent (40%) being single cars without having a car attached thereto, I mean that such car comes through alone, without any regard to any other cars coming into California.

After I have brought these automobiles into my place of business at Los Angeles, all of them are sold, traded, or disposed of in some way. I bring these automobiles in for commercial purposes, to try to make money on them. I sell [fol. 106] them to various dealers in the State of California.

These dealers come into my place of business from all sections of the state. I do a nice lot of business in San Francisco, San Diego, Riverside, San Bernardino, Bakersfield, Fresno, and all points of the state. These dealers sometimes purchase automobiles from me and transport them from my place of business to their own.

In a period of a month, on the average, 125 to 200 of my cars, or about one-half thereof, are sold outside the City of Los Angeles, such as San Diego, San Bernardino, San Francisco and at other points outside the state such as Seattle and Portland. The dealers come to Los Angeles and buy these cars, and drive them away, the same as new cars.

I have been in business in Los Angeles since 1928 or 1929. I do a wholesale business only, the cars which I bring in being from outside the state and for the purpose of resale to other dealers. The average net profit made by me on each automobile ranges from $10.00 to $15.00, and the money made depends upon volume of business. I have taken cars to San Francisco which were sold there after arrival.

In bringing in an automobile that is towed, we use two systems in connecting the two cars together, one being by tow bar, and the other by safety chains. The tow bar is a bar of steel construction that is hooked on to the rear of the towing automobile and under the front of the towed automobile. I have ridden in one of these automobiles which was towing another, and have stopped the front automobile, and I have had no difficulty in driving an automobile with another towed to it, nor have I noticed any particular hazard in so driving. I have driven an automobile for fifteen years. In my opinion it is possible to drive, [fol. 107] in a careful and prudent manner, an automobile with another automobile connected to it by means of a tow bar, or a safety chain.

In driving these cars into the State of California, I do no radio or newspaper advertising for any individuals to drive the cars. The persons who drive them are in my employ. Part of them have been in my employ for a long time, and a very small percentage are people who are coming to the coast and who come through with the automobile.

There are many dealers and individuals at various places where we operate who make it their business to bring cars through for my firm, or similar firms, receiving a flat fee

of $7.50, $10.00, or $15.00, as agreed upon. A very small percentage of the drivers are people desiring to come out to the coast, and who drive a car here for transportation and possibly meals and gas or oil, or other consideration, depending on the agreement made. As a rule, however, the automobiles driven into the State of California are driven in by people in my employ.

In every instance, the actual buyer, who handles the funds for the company, hires the drivers, and has his regular drivers, comes through with the caravan of automobiles. We also have a "trouble shooter" with these cars, who looks after the mechanical condition of the cars.

I have been driving automobiles into the State of California for approximately three years, and during that time none of my cars have ever been in an accident, nor have any of my drivers ever been arrested.

A "trouble shooter" accompanies any caravan of over four or five cars, an actual caravan of automobiles when [fol. 108] grouped together, and he does not accompany a single car brought in alone. In caravans, the average number of cars is twelve, to which are assigned one "trouble shooter", and one man to every two cars. The trouble shooter and the buyer or manager in charge of these caravans always drive single cars.

I have actually caravanned cars myself from eastern points, and have actually run them through with myself in charge thereof. I have observed caravan automobiles being driven into the State of California, and I have observed nothing about the caravanning of automobiles from without the State of California into the State of California for the purpose of sale that causes me to believe that there is any hazard in the mere driving of these cars. I do not have any trouble, it has not proven hazardous to us, and we have had no accidents.

Cross-examination:

The hiring of drivers for my cars is handled by my caravan manager, buyer, or supervisor in charge of every caravan. The number of supervisors varies from time to time with the number of buyers in the territory. At the present time there are approximately eight such buyers, located

throughout the southern states. We do a limited business at Detroit, Iowa, Nebraska and Illinois, but our main sources of supply are Shreveport, Fort Worth and Dallas.

The average number of cars in a caravan is about 12, and the number of drivers varies. All are in charge of the caravan manager and actual buyer. Their instructions are to have a driver for each single unit coming through and one driver for every hook-up. Occasionally relief drivers are brought through. The supervisors drive a single unit.

[fol. 109] So far this year I have brought into the State of California by caravan approximately 3,000 cars, almost from every point in the United States, but mostly from the southern states. I procured them by mutual agreement or purchase, and contacted the sellers through efforts of my buyers, who are located in various parts of the country, mostly in the southern states, and who are in my regular employ. Their work varies on salary and commission basis. They purchase cars from wholesale houses and distributors, the same as they are sold in Los Angeles, and they contact the automobile firm the same as buyers who buy from me. I deal exclusively in second hand cars. We have bought some second hand cars in Los Angeles. Out of 3,000 cars bought this year, probably 50 were purchased in California. The original idea in organizing in those states is that used cars cannot be purchased in California to any great extent. The reason for my business is that dealers demand used cars and they come to me to get them because I have available cars, and they cannot get them in any other way. If the used car industry is to exist they must get used cars from without the State of California. There are not enough used cars in the state to meet the demand therefor.

[fol. 110] STIPULATION APPROVING STATEMENT OF THE EVIDENCE

It is stipulated and agreed by and between the undersigned parties, by their respective counsel of record, that the foregoing statement of the evidence is a true and correct statement of all of the evidence introduced at the trial of the above entitled cause, reduced to condensed and nar-

rative form in conformity with Federal Equity Rule No. 75 (b), and that the foregoing statement of the evidence with this stipulation attached may be approved by the Court or the Three Judges hearing this cause and upon such approval shall be filed in the clerk's office, and shall be a part of the transcript of record on appeal, all without further notice to the plaintiff and appellees or their attorneys and without the necessity of said Court being reconvened, and at any time and place the said Judges may elect.

Dated this 29th day of September, 1936.

Howard Morf, Doing Business under the Firm Name and Style of Pacific Wholesale Automobile Company; United States Fidelity and Guaranty Company, a Corporation, and Continental Casualty Company, a Corporation, Plaintiff and Appellees, by Pierson and Block, Ralph K. Pierson, Their Attorney of Record. Ray Ingels, as Director of the Motor Vehicle Department of the State of California; Howard E. Deems, as Registrar of the Motor Vehicle Department of the State of California; John C. Corbett, Fred E. Stewart, R. E. Collins, Ray Edgar and Ray L. Riley, as Members of the State Board of Equalization and Constituting Said Board in the State of California; and E. Seymour, by U. S. Webb, Attorney General of California, by Frank Richards, Deputy Attorney General of California.

[fol. 111] ORDER APPROVING STATEMENT OF THE EVIDENCE

The foregoing statement of the evidence, with the written stipulation of the parties to the above entitled action that the said statement of the evidence is true, complete and properly prepared and may be approved by the Court or the Judges thereof, having been presented to the undersigned Judges, and having been examined and found to be true, complete and properly prepared, is approved and is ordered to be filed in the clerk's office and made a part of

the record for the purposes of appeal in this cause to the Supreme Court of the United States.

Dated this 6th day of October, 1936.

Clifton Mathews, Judge of the United States Circuit Court of Appeals, Ninth Circuit. Albert Lee Stephens, Leon R. Yankwich, Judges of the United States District Court for the Southern District of California.

(Endorsed:) Received copy of within Proposed Amended Statement of the Evidence this 4th day of September, 1936. U. S. Webb, Atty. Gen'l, by Frank Richards, Deputy Atty. Gen'l.

[File endorsement omitted.]

[fol. 112] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL TO SUPREME COURT OF UNITED STATES —Filed August 14, 1936

[fol. 113] To the Honorable Clifton Mathews, Judge of the Ninth Circuit Court of Appeals, and the Honorable Albert Lee Stephens and Leon R. Yankwich, Judges of the District Court of the United States for the Southern District of California:

Your petitioners, the above named defendants and appellants, Ray Ingels, as Director of the Motor Vehicle Department of the State of California; Howard E. Deems, as Registrar of the Motor Vehicle Department of the State of California; John C. Corbett, Fred E. Stewart, R. E. Collins, Ray Edgar and Ray L. Riley, as members of the State Board of Equalization and constituting said Board in the State of California; and E. Seymour, respectfully show:

On September 25, 1935, the above named plaintiff and appellee filed his bill of complaint herein alleging that Chapter 402, Statutes of 1935 of the State of California, is void as to plaintiff (appellee) as in violation of the

Commerce Clause of Section 8 of Article 1 of the Constitution of the United States, and of the Equal Protection of the Laws and Due Process of Law Clauses of Section 1 of the Fourteenth Amendment to the Constitution, and praying that a temporary restraining order issue forthwith without notice restraining defendants (appellants) from enforcing said Chapter 402 against plaintiff (appellee), and praying that interlocutory injunction issue restraining defendants (appellants) as aforesaid, and praying that on final hearing decree for permanent injunction be entered enjoining defendants (appellants) as aforesaid.

On September 25, 1935, temporary restraining order issued from the court restraining your petitioners, the said defendants and appellants, as prayed in said bill of [fol. 114] complaint, upon plaintiff's filing bond in the sum of $2,000.00 conditioned as required by law, which was done; with United States Fidelity & Guaranty Company, a corporation, as surety upon said bond.

On said day, September 25, 1935, an order issued from the court directed to your petitioners to show cause why interlocutory injunction should not issue restraining them from enforcing said Chapter 402 against plaintiff (appellee) as prayed in said bill of complaint.

Thereafter said temporary restraining order was continued in force until entry of final decree herein, and under the terms of said temporary restraining order as continued in force, plaintiff (appellee) filed other bonds to keep said order in force, conditioned as required by law, and there are now on file in the office of the Clerk of this Court bonds filed by plaintiff (appellee) under the terms of said temporary restraining order, as continued in force, in the total penal sum of $8,000.00 upon which said United States Fidelity and Guaranty Company is surety, and one bond in the penal sum of $10,000.00 upon which The Continental Casualty Company, a corporation, is surety. The said United States Fidelity and Guaranty Company and the Continental Casualty Company are necessary parties to this appeal.

On October 22, 1935, your petitioners filed answer and return to said order to show cause, alleging said Chapter 402 to be constitutional.

On November 29, 1935, this Court of Three Judges was convened and this cause came on for hearing before said

Court on plaintiff's (Appellee's) prayer in said bill of complaint for interlocutory injunction as aforesaid. At [fol. 115] said hearing evidence was introduced by plaintiff (appellee) and by your petitioners and the cause was argued and submitted to the Court, and it was stipulated by said parties that the Court could enter final decree upon the record made.

On June 8, 1936, the Court made and entered its findings of fact and its conclusions of law, and entered its final decree permanently enjoining your petitioners from enforcing said Chapter 402 against plaintiff (appellee).

The said final decree is greatly to the prejudice and injury of your petitioners and is erroneous and inequitable. The errors upon which your petitioners claim to be entitled to an appeal are more fully set out in the assignment of errors and prayer for reversal, filed in the office of the Clerk of this Court, and presented herewith, pursuant to Rule 9 of the Rules of the Supreme Court of the United States.

There has likewise been filed in the Clerk's office, and there is presented herewith a statement as to the jurisdiction of the Supreme Court of the United States as provided by Rule 12 of the Rules of the Supreme Court of the United States.

Your petitioners further state that during the pendency of this appeal they will suffer great and irreparable injury, and the State of California will suffer great and irreparable injury, in the inability of your petitioners to collect from plaintiff (appellee) the permit fees required by said Chapter 402, unless order be made as provided in paragraph one of Rule No. 36 of the Rules of the Supreme Court of the United States, and Equity Rule 74, granting a supersedeas suspending during the pendency of this appeal the permanent injunction ordered by said final decree.

[fol. 116] Wherefore, in order that your petitioners may obtain relief in the premises and have opportunity to show the errors complained of, your petitioners pray for the allowance of an appeal in this cause from said final decree to the Supreme Court of the United States agreeable to the statutes and rules of said Court in such cases made and provided.

Your petitioners further pray that during the pendency of this appeal, the Court order that this appeal shall oper-

ate as a supersedeas and that the permanent injunction ordered in said final decree be suspended upon such terms as to the filing of bond by petitioners and otherwise as to the Court shall seem proper; and that the Court make proper order touching the security required of petitioners in taking this appeal.

Your petitioners further pray for citation as provided by law and Rule 10 of the Rules of the Supreme Court of the United States directed to Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company, plaintiff and appellee, and United States Fidelity and Guaranty Company, a corporation and Continental Casualty Company, a corporation, sureties of bonds filed by plaintiff and appellees.

U. S. Webb, Attorney General of the State of California, by Frank Richards, Deputy Attorney General of the State of California, Solicitors for Defendants and Appellants.

[File endorsement omitted.]

[fol. 117] In United States District Court

[Title omitted]

Assignment of Errors and Prayer for Reversal—Filed August 14, 1936

[fol 118] The defendants, by their solicitors, do on this 14th day of August, 1936, at the time of filing their petition for Appeal to the Supreme Court of the United States from the final decree entered in this cause on the 8th day of June, 1936, by the District Court of Three Judges, file and present to the Court their following assignment of errors on which they will rely in said appeal, and, for such assignment or errors say the Court erred in entering said decree permanently enjoining the defendants from enforcing against the plaintiff the provisions of Chapter 402, Statutes of 1935, of the State of California, and exonerating the bonds given by plaintiff under the temporary restraining orders herein; and erred in making and entering its findings of fact and conclusions of law; in the following respects:

1

The Court erred in holding Chapter 402 to be in violation of the Commerce Clause of Section 8 of Article One of the Constitution of the United States, because Chapter 402 does not discriminate against nor impose an unconstitutional burden upon interstate commerce nor otherwise conflict with the Commerce Clause.

2

The Court erred in holding Chapter 402 to be in violation of the "equal protection of the laws" clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, because Chapter 402 does not unconstitutionally discriminate against plaintiff or any other person or deny to plaintiff the equal protection of the laws.

[fol. 119]

3

The Court erred in holding Chapter 402 to be in violation of the "due process of law" clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, because Chapter 402 does not impose unreasonable requirements upon plaintiff and does not deprive him of property without due process of law.

4

The Court erred because on the entire record the plaintiff has failed to sustain the burden of overcoming the presumption of the correctness of the judgment of the Legislature that a valid need of legislation existed and that the class defined in Chapter 402 includes the entire class properly the subject of such legislation, and has failed to overcome the presumption that Chapter 402 is reasonable and non-discriminatory.

5

The Court erred in making affirmatively stated findings of fact (22) and (26) to the effect that Chapter 402 discriminates against plaintiff in his operations in interstate commerce in favor of intra-state commerce, because the evidence on the entire record is insufficient to overcome the presumption of the propriety and non-discriminatory character of the classification made by such Act, and because the evidence shows that the class defined in said Act

is a distinct class constitutionally subject to separate classification, and that there is no other motor vehicle traffic in California in either intra-state or interstate commerce similar or comparable to that conducted by the included class.

6

The Court erred in making affirmatively stated findings of fact (8), the last sentence of (9), and (27), and negatively stated findings of fact (4), (6), (7), and (8), to the effect that there are no unusual or serious safety, traffic or police problems created by the movement of vehicles on their own wheels into California for purpose of sale, because the evidence on the entire record is insufficient to overcome the presumption of the correctness of the judgment of the legislature that such problems existed and merited the enactment of Chapter 402, and because the evidence shows that the class defined in Chapter 402 conducts a specialized form of highway traffic, substantially distinct from other traffic, which creates substantial safety, traffic and police problems differing from those of other traffic.

[fol. 120]

7

The Court erred in making affirmatively stated findings of fact (11) and (19) to the effect that plaintiff's sole occupation is that of dealer in automobiles, and in making negatively stated findings of fact (2) that plaintiff's use of the highways is not an extraordinary use or for direct gain or profit or as a place of business, because the allegations of plaintiff's bill of complaint and the evidence show that the principal element of plaintiff's occupation is that of transporting automobiles upon the highways on their own wheels to market for commercial gain.

8

The Court erred in making affirmatively stated finding of fact (20) and negatively stated finding of fact (1), to the effect that Chapter 402 does not exact a charge for the use of the public highways, because the same are not findings of fact but are conclusions as to the interpretation of the terms of the statute not aided by or based on any evi-

[fol. 121]

dence; and because such Act by its terms shows, and the evidence shows, that the permit fee it requires is

exacted, at least in part, as a charge for the use of the public highways for commercial gain.

9

The Court erred in making affirmatively stated findings of fact (21) and (22) to the effect that the permit fee required by Chapter 402 is arbitrarily fixed and unreasonable in amount, because such fee is a police power license fee and is a tax for a commercial use of the highways, and the evidence does not show that the amount of the fee is excessive either as a police power license fee, or as a tax for the use of the highways, or as both.

10

The Court erred in making affirmatively stated findings of fact (19), (25) and (27) and negatively stated finding of fact (3) to the effect that plaintiff brings cars in singly and not in groups, because the evidence is insufficient to show that plaintiff does so, but does show that the regular and prevailing practice of those within the class defined in Chapter 402 is to move vehicles in fleets and that plaintiff regularly follows the prevailing practice.

11

The Court erred in making affirmatively stated findings of fact (15), (16), (17), and (7), to the effect that plaintiff attempted to move three particularly described vehicles into California, one singly and two joined, but not in groups with other vehicles, and that plaintiff's specific complaint in this case is the demand by defendants that plaintiff pay upon such specific vehicles the permit fee required by Chapter [fol. 122] 402, because plaintiff's bill of complaint does not allege a practice of moving vehicles singly and not in fleets and does not predicate any special claims of unconstitutionality on the ground that the Act applies to singly moved vehicles, but said bill alleges generally that Chapter 402 is entirely invalid and asks that the entire enforcement thereof be enjoined, and does not seek relief with respect to singly moved vehicles or any particular vehicles; and because plaintiff's bill does not claim and the evidence does not show that the vehicles particularly described in said bill were driven singly and not as part of a fleet; and because

there is no evidence of the moving by the plaintiff of the vehicles or of any particular vehicle.

12

The Court erred in making affirmatively stated findings of fact (19) and (14), to the effect that to require plaintiff to pay the fifteen dollars permit fee for each automobile would absorb his profit and ruin his business and a large part of the used car business in California, because there is no evidence to support such finding and because the evidence affirmatively shows the condition of the used car market in California to be such that the purchasers would absorb such permit fee cost.

13

The Court erred in making affirmatively stated findings of fact (7), (23), (27), and (31) in so far as the same attempt to construe Chapter 402, because the same are not findings of fact but are argumentative conclusions as to the construction of Chapter 402 based solely upon the terms of the Act and not upon evidence; and because the evidence sustains the judgment of the legislature as to the necessity [fol. 123] of the legislation and the propriety of the classification.

14

The Court erred in making affirmatively stated findings of fact (4) and (6) and negatively stated finding of fact (5), because the same are not findings of fact, but are argumentative legal propositions and are incorrect as such.

Wherefore, the defendants pray that the said decree be reversed and the District Court be directed to dissolve the permanent injunction therein ordered and to dismiss plaintiff's bill of complaint and to enter judgment against plaintiff and the sureties on his bonds for the amount of damages sustained by defendants by reason of the issuance and continuance of the temporary restraining orders herein, and for costs, and that defendants be granted such other relief as may be appropriate and equitable.

U. S. Webb, Attorney General of the State of California, by Frank Richards, Deputy Attorney General of the State of California, Solicitors for Defendants and Appellants.

[File endorsement omitted.]

[fol. 124] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL TO SUPREME COURT OF THE UNITED STATES—Filed August 17, 1936

[fol. 125] The petition of Ray Ingels, as Director of the Motor Vehicle Department of the State of California; Howard E. Deems as Registrar of the Motor Vehicle Department of the State of California; John C. Corbett, Fred E. Stewart, R. E. Collins, Ray Edgar and Ray L. Riley, as members of the State Board of Equalization and constituting said Board in the State of California; and E. Seymour, the defendants and appellants in the above entitled cause, for an appeal in the above entitled cause to the Supreme Court of the United States from the judgment of the District Court of the United States for the Southern District of California, Central Division, having been filed herein, accompanied by assignment of errors as provided in Rule 9 of the Rules of the Supreme Court of the United States, and a statement as to jurisdiction of the Supreme Court of the United States as provided by Rule 12 of said Rules, and the said papers having been filed and having been presented to this Court, and the record in this cause having been considered;

It is Hereby Ordered, that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final decree of the District Court of the United States for the Southern District of California, Central Division, entered in this cause on the 8th day of June, 1936, and that the Clerk of said District Court of the United States for the Southern District of California shall, within sixty days from this date, make and transmit to the Supreme Court of the United States, under his hand and seal of the Court, a true copy of the material parts of the record herein, which shall be designated by præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

[fols. 126-129] It is Further Ordered, that citation issue to Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company, the above named plaintiff and appellee, and to United States Fidelity and Guaranty Company, a corporation, and to Continental

Casualty Company, a corporation, they being sureties on bonds filed by said plaintiff to obtain and continue in force temporary restraining order herein, and necessary parties appellees.

It is Further Ordered, that defendants and appellants file bond for costs in the penal sum of $100.00.

Done by the Court this 14th day of August, 1936.

Clifton Mathews, Circuit Judge. Albert Lee Stephens, District Judge. Leon R. Yankwich, District Judge.

[File endorsement omitted.]

[fol. 130] In United States District Court

[Title omitted]

Præcipe for Transcript of Record—Filed October 7, 1936

[fol. 131] To the Clerk of the District Court of the United States for the Southern District of California, Central Division:

For the purpose of the record on appeal in the above entitled cause, please prepare, certify and transmit to the Clerk of the Supreme Court of the United States, a transcript of the following from the files and records of your Court in said cause:

1. Plaintiff's bill of complaint.
2. Temporary restraining order and order to show cause, and returns showing service thereof.
3. Subpœna and returns showing service thereof.
4. Entry of appearance by defendants.
5. Joint return to order to show cause, and joint answer, of all of the defendants.
6. Statement of the evidence, with stipulation approving same, and order and certificate approving such statement.
7. Defendants' exceptions to proposed findings of fact and conclusions of law.
8. Findings of fact and conclusions of law.
9. Final decree as amended.

10. Orders substituting Howard E. Deems as Registrar of the Motor Vehicle Department of the State of California, as a party defendant in place of Russell Bevins, and substituting Ray Edgar as a member of the State Board of Equalization in place of Orfa Jean Shontz.

11. Petition for appeal to Supreme Court of the United States.

12. Statement of jurisdiction of the Supreme Court of the United States, with opinions of Court and dissenting opinion thereto attached.

13. Assignment of Errors on appeal to Supreme Court, and prayer for reversal.

14. Order allowing appeal to Supreme Court of the United States.

15. Proof of service of copies of the petition for appeal, statement of jurisdiction, assignment of errors, and order allowing appeal, and acceptance of service thereof by [fol. 132] Ralph K. Pierson as attorney for Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company.

16. Citation with acknowledgment of service thereof by Ralph K. Pierson as attorney for Howard Morf doing business under the firm name and style of Pacific Wholesale Automobile Company.

17. Notice of appearance of Pierson & Block as attorneys of record for United States Fidelity and Guaranty Company and Continental Casualty Company, appellees, and acknowledgment of service of documents, dated September 10, 1936, and signed by Ralph K. Pierson.

18. Bond for costs on appeal.

19. This præcipe.

U. S. Webb, Attorney General of California, by Frank Richards, Deputy Attorney General of California.

[fol. 133] Service of the foregoing præcipe for transcript of record on appeal and receipt of copy thereof is acknowledged. It is stipulated and agreed that such præcipe includes all of the record necessary to be included in the transcript on appeal to the Supreme Court of the United States; and that said præcipe may be filed as the præcipe

for transcript of the record on appeal agreed upon by stipulation of the parties hereto.

Dated this 30th day of September, 1936.

Howard Morf, Doing Business under the Firm Name and Style of Pacific Wholesale Automobile Company; United States Fidelity and Guaranty Company, a Corporation; Continental Casualty Company, a Corporation, Plaintiff and Appellees, Pierson and Block, by Ralph K. Pierson, Their Attorney.

[File endorsement omitted.]

[fols. 134-136] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 136-19] In United States District Court for the Southern District of California, Central Division

Eq. No. 759-S

Howard Morf, Doing Business under the Firm Name and Style of Pacific Wholesale Automobile Company, Plaintiff,

vs.

Ray Ingels, as Director of the Motor Vehicle Department of the State of California, Russell Bevins, as Registrar of the Motor Vehicle Department of the State of California, John C. Corbett, Fred E. Stewart, R. E. Collins, Orfa Jean Shontz and Ray L. Riley, as Members of the State Board of Equalization and Constituting Said Board, in the State of California, and E. Seymour, Defendants.

Amended Opinion

Appearances:

For Plaintiff: Pierson & Block, by Ralph K. Pierson and Samuel P. Block.

For Defendants: U. S. Webb, Attorney General, by Frank Richards, Deputy Attorney General.

Before Mathews, Circuit Judge, Stephens and Yankwich, District Judges

Opinion by STEPHENS, District Judge:

The plaintiff seeks to enjoin state officials from enforcing a state law which allegedly invades his rights under the Federal Constitution. Upon issue joined, the case was tried and submitted for decision in a three judge court.

For several years automobiles have been transported upon their own wheels from eastern points for sale in [fol. 136-20] California. The practice increased so that automobiles, or cars, as we shall hereafter generally refer to them, were being brought into California singly and in fleets of from three to forty. In the fleets which were commanded by experienced men there were single cars and cars that were linked together, the leading one pulling the other. Up to November 29th last, about fourteen thousand cars had been rolled into the state during the year, and it is safe to say that the number exceeded fifteen thousand for the full year. The fleet movement where made up of more than four automobiles caused certain traffic difficulties such as passing the fleet and meeting cars while passing it. The fleet would sometimes stop, affecting the flow of traffic. When motor police would stop a car in the fleet, those following would sometimes drive so as to interfere with other traffic. The drivers were not always careful as to their automobile lights and the towed car sometimes swayed. Some of the drivers were unfamiliar with California traffic regulations and some were fatigued.

Plaintiff is a wholesale dealer of used cars with his principal place of business in Los Angeles. He sells cars for delivery in other parts of the state and a smaller number for delivery in the north Pacific states. He buys cars and brings them into California singly and by twos coupled and sometimes in fleets of several. The cars are operated directly under his supervision and responsibility and not under contract. Although he has been operating this way for several years no traffic trouble has occurred in connection with his activity. The specific complaints in this case are, first, the demand for a license fee for driving a single car not in fleet across the California line from Arizona, and, second, demands for license fees for so driving a car with

another car attached. Between 30% and 40% of such imported cars are driven to and across the California state line singly and not in company with other automobiles. Plaintiff's business is large and lucrative but it would appear that the required $15.00 license fee for each car he brings into California would practically absorb his net profit and would ruin his business. It is a serious situation for him and others in like circumstances.

[fol. 136-21] The Basic Theory of National Unity and Equality of the Laws

Preferential laws for state industries and the rivalry for foreign commerce prompted the enactment of tariffs against foreign imports between the states under the old Federation. The situation was very detrimental to national peace and unity and was one of the primary causes for the Constitutional requirement that "all duties, imposts and excises shall be uniform throughout the United States" and for the constitutional provision that Congress should have the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes" (Art. I, sec. 8), and that "no state shall, without the consent of Congress, lay any duty on tonnage" (Art. I, sec. 10). Through the Fifth and the Fourteenth Amendments the Constitution has provided for the security of property and for the personal freedom from arbitrary state action under the clauses requiring due process of law and the equal protection of the laws. In many instances the states have legislated in contravention of these "equality" principles, a practice certainly to be guarded against with vigilance equal to that we should use against encroachment of national legislation upon the reserved rights of the states. Through the years the courts have met the difficult problems of construing the enacted statutes under these constitutional rules.

No nice and undeviating line has been discovered marking legislation on the one side in harmony with these constitutional provisions and on the other in conflict with them, but action has been held within a fairly narrow zone of deviation, under new and changing conditions, through the process of classification.

"The equal protection of the law means subjection to equal laws applying alike to all in the same situation. While

reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must [fol. 136-22] be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed."

So. Ry. v. Greene, 216 U. S. 400;
Darnell & Son v. Memphis, 208 U. S. 113, at 120;
Continental Baking Co. et al. v. Woodring, 286 U. S. 352.

Classification Cannot be Sustained

The California legislature of 1935 legislated extensively upon the subject of motor transportation. It adopted "The Vehicle Code" (St. 1935, p. 93) and many other acts relating to the subject of motor transportation, including the so-called Caravan Act (c. 402, Stat. 1935), hereunder consideration. In section 146.5 of the vehicle code it provided for the registration of cars previously registered outside California. This District Court sitting as a three judge court recently declared this section unreasonable, discriminatory, and void. (Asher & Ponder v. Ingels et al., No. 8144.) Ostensibly its purpose was to prevent the importation of stolen cars into California; actually it practically prohibited the sale of cars in California that had been registered elsewhere. We have referred to these several acts to show that the legislature covered the subject of motor vehicle transportation comprehensively and, through separate but related acts sought to apply its legislative discretion to all conditions it deemed desirable to treat. The purpose of each act is more easily understood and the expressed purpose in each act becomes more definitely a limitation upon its basic theory and purpose through such information.

The term "caravan" as applied to and used in the act under consideration is a misnomer and leads to misunderstandings. In a metaphoric sense it has come to mean a considerable number of persons journeying in company by several or many vehicles. Fleet movement of cars may with propriety be termed caravans.

But the so-called "caravan act" although including such fleet movement of cars as hereinbefore described is by no means limited thereto. In fact it straightway defines the [fol. 136-23] term "caravaning" as the movement of a sin-

gle car upon its own wheels into California to be sold. There is nothing in the act that even refers to caravaning as that term is commonly understood, except that not more than three "vehicles or groups of vehicles" can be operated legally upon the highways unless spaced 150 feet. But this provision applies only to cars for sale that are rolled by highway into California upon their own wheels. There is nothing in the act indicating that the legislature has determined that the practice of bringing cars into California for sale in this way is undersirable or that the act is intended to prevent, limit, or regulate the practice, except as to the spacing mentioned. There is nothing in the evidence that indicates any police problem resulting from the use of the highway except through fleet or caravan formation. Yet the act is specifically directed to each and every car falling within the prescribed specifications, in fleet or not, to-wit, entering California upon its own wheels and being for sale.

The Supreme Court in Darnell & Son v. Memphis, supra, quoted the following from Guy v. Baltimore, 100 U. S. 434, with approval:

"In view of these and other decisions of this court, it must be regarded as settled that no state can, consistently with the Federal Constitution, impose upon the products of other states, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other states, more onerous public burdens or taxes than it imposes upon the like products of its own territory. If this were not so, it is easy to perceive how the power of congress to regulate commerce with foreign nations and among the several states could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several states be materially abridged and impaired."

See also Smith v. Cahoon, 283 U. S. 553.

Most, if not all, of the cases relied upon for the validity of the Act are common carrier cases. Cases arising from [fol. 136-24] the business of selling transportation upon and along the public highways. In such cases, subject to reasonableness and to the interstate commerce clauses of the Fed-

eral Constitution, the state denies, permits, regulates, and licenses such businesses. The permits issued and license fees paid are for continuing operation. The vehicles used are usually large and heavy, burdening the road and its roadbed. The difference is obvious between such cases and the instant one, where only ordinary automobiles for which the highways were primarily constructed are transported over but a few miles of highway and for but a few days (usually not a whole day), under the license permit. Expressions in opinions of courts must be read accordingly. It must always be borne in mind that plaintiff is not a common carrier, accepts no article for transportation for hire, and transports only his own property. It would appear that plaintiff has as good a right to the use of the highways as anyone else transporting his own goods; subject, of course, to such police regulation as is reasonable in the circumstances. See Packard v. Banton, 264 U. S. 140; also Buck v. Kuykendall, 267 U. S. 307, at 314.

There is no doubt that classification to be legal need not approximate perfection and as said in Patoine v. Pennsylvania, 232 U. S. 138, the legislature "may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses." There are single and fleet movements of cars for sale from point to point within the state, and there are other instances of troublesome use of the highways in the State of California as well as across the state lines. Instance the grouping of large vision obscuring trucks with trailers, the practice of hauling from three to five automobiles upon one lock truck and trailer; and the trailer living quarters so greatly on the increase. Under the doctrine expressed in the Patisone case, such instances do not necessarily invalidate a classification. They are eloquent however of the fact that the defining elements of the Caravan Act classification are not elements of the wrong aimed at and do not gather together the common malfactors but do arbitrarily and unreasonably embrace innocent actors. It should be noticed [fol. 136-25] that the Act extends its burdens to singly driven cars and too cars coupled together that do not add any specific police burden. These cars come into sales competition with cars driven wholly within the state for sale.

The License Fee of $15.00 Per Car is Arbitrarily Fixed and Unreasonable in Amount

The purpose of assessing a fee for each car admitted, expressed in the Act, is to defray the expenses of adequately policing the highways where used in this importing practice, together with the administrative expense of the Act. The full sum collected goes into the general state fund. It is argued that the state may charge for the commercial use of its highways. We have already stated that the use plaintiff makes of the highways is not a privilege that will support a tax under the act for other than such extra policing reasonably required by fleet movement. But aside from that there is no basis in the act upon which a highway tax can be estimated or calculated. As to purposes of fee, see: Interstate Transit Inc. v. Lindsey, 283 U. S. 183; Kane v. New Jersey, 242 U. S. 160; Sprout v. South Bend, 277 U. S. 163, at 170 and 171; Interstate Busses Corp. v. Blodgett, 276 U. S. 245.

There is a provision of the act to the effect that the licensing fee of $15.00 per car is in lieu of all other fees, but this is meaningless. It merely exempts the importing car operator from paying fees required of carriers defined and provided for in the other motor vehicle acts. But there is nothing in any act that requires the payment of any such fees by plaintiff or persons in his circumstances. The purchaser of the imported car must pay the regular state automobile license fees and must pay the property taxes placed upon the car in the same manner as upon any other car and to the same extent. The $15.00 fee cannot be bolstered into reasonableness through recital in the act of unreal benefits to the licensee.

Although there is language in the act that might seem to require it, we think no pains need be taken to discuss in full the claim of plaintiff that he need pay a $25.00 fee (it has not been demanded) before applying for the special [fol. 136-26] permit hereinbefore mentioned nor that he is compelled against his will and against the facts obtaining, to assume the status of a common carrier or a carrier for hire (California Carriers' Act). The so-called Caravan Act itself excludes such fee and if the law attempts to fix upon plaintiff a status not justified by the facts, it goes beyond the power of the legislature and is to that extent void

as to him. Frost Trucking Co. v. R. R. Comm., 271 U. S. 583. It does not affect the other part of the statute, however, and is severable. For the theory of levying tax on vehicles using highways see Interstate Transit Inc. v. Lindsey, 283 U. S. 183; Mallory v. Alabama, 296 U. S. 261; Interstate Busses Corp. v. Blodgett, 276 U. S. 245.

We have examined the California Carrier's Act (c. 223, Stat. 1935) and find that it does not affect plaintiff in any but in the most incidental and inconsequential manner, if at all.

We come directly to the reasonableness of the license fee. As shown by the evidence in this case, during the year 1935 a great increase of automobile use of the highways occurred and for that year at least 15,000 cars were brought into the state for sale under conditions hereinabove recited. The mileage for such cars within the state and the operation upon the highways under the permit is, of course, very little. They go only to the market place. The increased personnel of motor policemen along the routes used by these fleets, for care of all traffic conditions during 1935 up to date of hearing, amounted to but six, although a few more could be used handily. The salary of such officer averages around $200.00 per month. A few inspectors at the border offices have been put on since the passage of the law and there is some clerical expense. Even if the whole increase of expense just indicated were charged to "caravaning" it would seem mathematically demonstrable that the figure of $15.00 per each imported car was not fixed upon any basis of compensating the state for policing and for administering the act. The evidence would indicate that ten additional employees would more than take care of the situation, including the generally increased traffic. Allowing $200.00 per month each, the sum would amount to [fol. 136-27] $2,400.00, or for ten men $24,000.00, per year. Fifteen thousand cars at $15.00 per car would produce $225,000.00. Or looking at it in another way, the distance from border point to point of destination can be traversed in less than a day. The $30.00 charge for each operating unit of two cars would pay for a special police patrol, and even under such regulations a great profit would result. Of course, there is no contention that such a service is required. There can be no doubt but that the license fee is excessive and arbitrary.

The Deputy Attorney General argues that the highways belong to the people and that their use for commercial purposes can be charged for and he sought to show comparative railway charges for transporting automobiles. But this evidence has no materiality here. If the charge of $15.00 is intended as an equalization of transportation costs between railroads and highways, it rests upon an unsupportable premise.

The unreasonableness of the license charge discriminates against the plaintiff who brings cars into the state for sale in favor of those who deal in used cars obtained from within the state. The charge bears no reasonable relation to the purposes for which it is collected and in practical effect constitutes a protective tariff and is unconstitutionally burdensome. Interstate Transit Inc. v. Lindsey, 283 U. S. 183; Young's Market Co. v. Board of Equalization, 12 Fed. Supp. 140 and cited authorities.

The clear statement of principles in Baldwin v. Seelig, 294 U. S. 511, at 521, 523 inclusive, may be related to the instant case Mr. Justice Cardozo likens the attempt by the New York Legislature to fix milk producers' prices in Vermont on a par with those of New York, as a condition of its sale in New York, to customs duties. He says, "Such a power, if exerted, will set a barrier to traffic between one state and another, as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed by an express prohibition of the constitution, beyond the power of a state, 'Except what may be absolutely necessary for executing its inspection laws.' Con-
[fol. 136-28] stitution, Article I, Section 10, clause 2: • • • 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business'. International Textbook Co. v. Pigg, 217 U. S. 91; 112;"

To burden the movement of plaintiff's own property with a substantial tax, when that sum bears no reasonable relation to the express use of and cause of the levy, constitutes nothing less than a customs duty. To declare such tax legal as an exception would, to use the apt words of the Justice above quoted, "be to eat up the rule under the guise of an exception." Other cases of interest by analogy

are Voight v. Wright, 141 U. S. 62; Brimmer v. Rebman, 138 U. S. 78; Webber v. Virginia, 103 U. S. 344.

The state cannot exact an arbitrary toll for revenue from any class of highway users. Interstate Transit Inc. v. Lindsey, supra; Sprout v. City of South Bend, 277 U. S. 169.

Judgment will go for plaintiff. A permanent injunction will issue and the bonds given under the temporary restraining order will be exonerated.

Dated May 5th, 1936.

Clifton Mathews, Circuit Judge. Albert Lee Stephens, District Judge. (Not Signed) Leon R. Yankwich, District Judge.

(Indorsed:) Filed Jun. 5, 1936. R. S. Zimmerman, Clerk, by Theodore Hocke, Deputy Clerk.

[fol. 136-29] In United States District Court for the Southern District of California, Central Division

Eq. No. 759-S

Howard Morf, Doing Business under the Firm Name and Style of Pacific Wholesale Automobile Company, Plaintiff,

vs.

Ray Ingels, as Director of the Motor Vehicle Department of the State of California, et al., Defendants.

Dissenting Opinion

Yankwich, District Judge:

I dissent.

The main opinion admits that caravaning of automobiles from other states to California has been so extensive as to create a problem. But it denies validity to the California Caravan Act (Statutes of 1935, Chap. 40, California Vehicle Code pp. 174-176) for three reasons: (1) That the classification is arbitrary, in that it does not apply to what is strictly speaking caravaning, i. e., fleet movements of cars on their own wheels, but includes a single car transported from without the state of California, (as the enact-

ment provides) "on its own wheels, or in tow of another motor vehicle for sale." (2) That it is, in reality, a protective tariff against automobiles transported for sale from without the State of California, and thus violative of the commerce clause of the Constitution of the United States (Constitution of the United States, Article I, Section 8) and (3) that the amount of the fee charged for each caravaned automobile is excessive and arbitrary and has no relation to the cost of the added burden upon the state traffic, which might justify the regulation, and is thus violative of the due process and equal protection clauses of the Constitution. (Constitution of the United [fol. 136-30] States, 14th Amendment, Section 1.) Because of the importance of the matter, I state the reasons for my dissent fully. Of necessity, the questions are interrelated. So to a certain extent the principles involved must be treated together.

The power of the Congress to regulate commerce between the states is exclusive and penary, and is not subject to any state restrictions, burdens or limitations. (Gibbons v. Ogden (1824), 9 Wheat. 1, 70; University of Illinois v. United States (1933), 289 U. S. 48.) No state may, through the exercise of the taxing or police powers, establish an economic barrier between the states. (Baldwin v. G. A. F. Seelig, Inc. (1935), 294 U. S. 511; Bingaman v. Golden Eagle Western Lines, Inc. (1936), 80 L. Ed. page 600. However, a state may, in the exercise of its reserved power to regulate intrastate commerce, adopt measures and regulations which affect interstate commerce indirectly and incidentally only, or the persons engaged in it. If such regulations do not impede the free flow of commerce, they will be given validity. (See Boston and Maine Railroad Company v. Armbury (1932), 285 U. S. 234; Clyde Mallory Lines v. Alabama (1935) 80 L. Ed. 191.) So statutes which impose a charge for the use of the highways and facilities of a state by residents of other states or interstate carriers have been sustained. The limits of the exercise of this power have been stated by Mr. Justice Brandeis in Interstate Transit v. Lindsey (1931), 233 U. S. 183, 185:

"While a state may not lay a tax on the privilege of engaging in interstate commerce (Sprout v. South Bend, 277 U. S. 163, 72 L. Ed. 833, 62 A. L. R. 45, 48 S. Ct. 502), it may

impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon (Kane v. New Jersey, 242 U. S. 160, 168, 169, 61 L. Ed. 222, 227, 228, 37 S. Ct. 30; Clark v. Poor, 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702; Sprout v. South Bend, supra (277 U. S. 169, 170, 72 L. Ed. 836, 837, 62 A. L. R. 45, 48 S. Ct. 502). As such a charge is a direct burden on interstate commerce, the tax cannot be sustained [fol. 136-31] unless it appears affirmatively, in some way, that *it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic.* This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use (Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 72 L. Ed. 551, 48 S. Ct. 230), or by the express allocation of the proceeds of the tax to highway purposes, as in Clark v. Poor, 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702, supra, or otherwise. Where it is shown that the tax is so imposed, *it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory.*" (Italics added.)

Some cases intimate that the tax is considered as mere compensation for the damage done to the roads by the driving of automobiles and is based primarily upon the amount of destruction caused by them. (Kane v. New Jersey (1911), 81 N. J. L. 594, 80 Atl. 453.) Notwithstanding this, courts have left it to the legislatures of the various states to determine the form which the exaction should take. Thus (even in the case of interstate commerce carriers) it may take the form of a fee (Kane v. New Jersey (1916), 242 U. S. 160) or of a mileage tax, despite the fact that by the law of the particular state carriers of intrastate commerce are taxed upon the basis of gross receipts. (See Interstate Busses Corporation v. Blodgett (1928), 276 U. S. 245). Nor does the fact that such a tax imposed directly upon an interstate carrier may be in addition to an annual license fee demanded of all persons using automobiles, make the fee a discriminatory exaction violative of the commerce clause. (See Clark v. Poor (1927), 274 U. S. 554; Interstate Busses Corporation v. Blodgett, supra; American Motor Coach

System v. City of Philadelphia (1928), (C. C. A. 3) 28 Fed. (2) 736; Liberty Highway Company v. Michigan Public Utilities Commission (1923), D. C. 294 Fed. 703.) Indicative of the recent trend of the Supreme Court to sustain local impositions or regulations despite their incidental effect upon interstate commerce is Clyde Mallory Lines v. Alabama (1935), 296 U. S. 261. Despite the constitutional [fol. 136 32] inhibition against the laying of duties on tonnage by the states (Constitution of the United States, Article I, Section 10, Clause 3), the Court there sustained a flat harbor fee of $7.50 for vessels of 500 tons and over entering the harbor at Mobile, saying:

"And charges levied by state authority to defray the cost of regulation or of *facilities* afforded in aid of interstate or foreign commerce have consistently been held to be permissible." (Clyde Mallory Lines v. Alabama, supra at page 267.)

In the realm of control of highways, the basis and limits of allowable legislative power is given in Clark v. Poor, supra, at page 557:

"The highways are public property. *Users of them although engaged exclusively in interstate commerce, are subject to regulation by the State to insure safety and convenience and the conservation of the highways.* Morris v. Duby, ante, p. 135; Hess v. Pawloski, ante p. 353. Users of them, although engaged exclusively in interstate commerce *may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use.* Hendrick v. Maryland, 235 U. S. 610; Kane v. New Jersey, 242 U. S. 160. Compare Packard v. Banton, 264 U. S. 140, 144.

"There is no suggestion that the tax discriminates against interstate commerce. Nor is it suggested that the tax is so large as to obstruct interstate commerce. It is said that *all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the Commission in the administration or enforcement of the Act; and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which*

the proceeds are put is not a matter which concerns the plaintiffs." (Italics added.)

[fol. 136-33] Similar language is found in Liberty Highway Company v. Michigan Public Utilities Commission, supra, at page 708. In the light of these principles, the imposition of a license tax for the use of the highways of California for caravaning purposes, as defined in the Act, is not a restriction upon interstate commerce. The Act does not attempt to regulate the sale of automobiles from outside of the state or to impose restrictions upon the manner of their sale,—restrictions of the type which Judge Wilbur, Judge Stephens and the writer declared invalid in Asher & Ponder v. Ingels (1936), 13 Fed. Sup. 654.) Nor is it an attempt to compel the acquisition of a license for carrying on an interstate business. It is true that caravaning of automobiles within the state is not prohibited. But there is no evidence before us to justify the conclusion that the practice obtains to any considerable degree, in any case except in the case of automobiles originating outside of the state. And even if it were shown that caravaning is carried on, without restriction, with automobiles originating within the state, I do not think that the enactment would, for that reason alone, be invalid. We would merely have a case of a special restriction applicable to persons who seek to make the highways of the state the locale for carrying on business enterprises and no more unconstitutionally objectionable than the additional exactions sustained in Clark v. Poor, supra, and Interstate Busses Corporation v. Blodgett, supra. The more so as the Act specifically provides (in Section 5) that the fee shall be in lieu of all other registration fees and license fees for the use of the public highways, during the 90-day period for which the permits are granted. Clearly a state may, without violating the interstate commerce clause, exact a fee for the use of its highways for commercial purposes by owners of automobiles originating outside of the state in lieu of other exactions which it imposes upon automobiles within the state.

Nor is there, to my mind, any arbitrariness violative of due process involved in the size of the fee.

The cases in which the size of a fee has been held unreasonable have been cases in which the fee demanded was so out of proportion to the avowed purpose for which it was

[fol. 136-34] being collected as to shock, (as was the case in Interstate Transit v. Lindsey, supra, and Prouty v. Coyne (1932 D. C. S. D.), 55 Fed. (2) 289; and see Young's Market Co. v. Board of Equalization (1935 D. C. Cal.), 12 Fed. Sup. 140) and it was clear to the court that the enactments were, in reality, revenue statutes aiming to tax the right to carry on in-erstate business. But these very cases speak for the validity of a reasonable exaction, without requiring demonstration that the amount is just what is necessary to compensate the state for the use and upkeep of the highways. (See Gundling v. Chicago (1900), 177 U. S. 183.) As is said in Interstate Transit v. Lindsay, supra, at page 190:

"Being free to levy occupation taxes, states may tax the privilege of doing an intrastate bus business without regard to whether the charge imposed *represents merely a fair compensation for the use of their highways.*" (Italics added.)

The services of the state in allowing its highways to be used and in policing them are none the less a service which benefits all (*including the plaintiff*) because, in certain instances, the benefit *may* be greater to other persons than to him. (See Clyde Mallory Lines v. Alabama, supra, at page 194; Aero Transit Co. v. Georgia Commission (1933), 295 U. S. 285.) Few cases exist where the exercise of valid power has been nullified by the mere excessiveness of an impost. As said in A. Magnano Co. v. Hamilton (1934), 292 U. S. 40, at page 47:

"If the tax imposed had been five cents instead of fifteen cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a contrary conclusion were reached in the present case, it could rest upon nothing more that the single *premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business,* a premise which, standing alone, *this court heretofore has uniformly rejected as furnishing no juridical* [fol. 136-35] *ground for striking down a taxing act.*" (Italics added.)

In dealing with the subject of classification, in the exercise of the police power, it is well to bear in mind that it is

impossible to achieve absolute equality. Nor is such equality necessary in order to insure constitutional validity under the due process and equal protection of law clauses of the 14th Amendment to the Constitution. As said by Mr. Justice Holmes, in Patsone v. Pennsylvania (1914), 232 U. S. 138, in an oft-quoted passage:

"*A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named.*" (Italics added.)

(See also Radice v. New York (1924), 264 U. S. 292; McCary v. United States (1904), 195 U. S. 27; Rast v. Van Denman (1916), 240 U. S. 343, 357; Miller v. Wilson (1915), 236 U. S. 373, 383; Heisler v. Thomas Colliery (1922), 260 U. S. 245; Quaker City Cab Co. v. Pennsylvania (1928), 277 U. S. 389; New York ex rel. Bryant v. Zimmerman (1928), 278 U. S. 64; Fox v. Standard Oil Co. (1934), 294 U. S. 87; A. Magnano Co. v. Hamilton (1934), 292 U. S. 40; In re Miller (1912), 162 Cal. 675; Miller v. Board of Public Works (1925), 195 Cal. 477; Graham v. Kingswel (1933), 218 Cal. 658). These cases show that, in interpreting the exercise of the police or taxing powers, courts have not sought to bind legislative bodies to an abstract or unrealizable ideal of equality. They have insisted merely that there be a reasonable foundation for the classification. When satisfied of its existence, they have sustained it. (See St. Louis R. R. Co. v. Paul (1899), 174 U. S. 404; Petit v. Minnesota (1900), 177 U. S. 164, 168; Williams v. Fears (1900), 179 U. S. 270, 275; Knoxville Iron Co. v. Harrison (1901), 185 U. S. 14; Boxley v. McLaughlin (1915), 236 U. S. 385; Gregg [fol. 136-36] Dyeing Co. v. Query (1932), 286 U. S. 472; Hicklin v. Coney (1933), 290 U. S. 169; Nebbia v. New York (1935), 291 U. S. 502; Bordens Farm Products v. Ten Eyck (1936), 80 L. Ed. 469). A study of these and other cases warrants the following conclusion: If a legislature may, for regulatory purposes, distinguish between barber shop employment and other kinds of labor (Petit v. Minnesota, supra), or between "immigrant agents" engaged in hiring laborers to be employed beyond the limits of a State and

persons engaged in the business of hiring for labor within the State (Williams v. Fears, supra), or exclude chambermaids in rooming and lodging houses or women performers in certain places from the provisions of laws regulating the hours of labor of women (Miller v. Wilson, supra; In re Miller, supra; Radice v. New York, supra), or regulate the hours of labor of pharmacists and student nurses and exclude graduate nurses (Bosley v. McLaughlin, supra) or the manner of payment of wages of employes in certain industries only (St. Louis R. R. Co. v. Paul, supra), if a product, like oleomargarine, may be selected for special taxation so as to discourage its use, in favor of butter (A. Magnano Co. v. Hamilton, supra) if a legislature may require disclosure of the by-laws and membership of one group of oath-requiring association (like the Ku-Klux Klan), and not require it of others (like labor unions, or other fraternal organizations) (New York ex rel. Bryant v. Zimmerman, supra), if an automobile licensing and tax scheme may exclude automobiles of farmers or others from the exaction (Aero Transit Company v. Georgia Commission (1935), 295 U. S. 285; Hicklin v. Coney, supra), if, in the enforcement of an industrial regulatory measure, an administrative body may apply different rules as to price as between well-advertised dealers and independents, giving a differential to one group and not to the other (Borden's Farm Products v. Ten Eyck, supra), a classification which, so far as known includes the whole class, should not be stricken down, merely because of the possibility that it might result in inequality in some individual case. There is no evidence in the record that there is any caravaning within the state. And while it is true that, occasionally, a [fol. 136-37] car may be moved on its own wheels for the purpose of sale within the state, this fact does not militate against the validity of the classification. Such car, of necessity, would have a California registration and would be moved by employes of the owner or of the buyer and would present none of the dangers of out-of-state transportation. So we have a reasonable factual basis for the classification. (See Piper v. Bingaman (1935) (D. C. N. Mex.), 12 Fed. Sup. 755.)

"Of course, the mere fact of classification is not enough to put a statute beyond the reach of the equality provision of the Fourteenth Amendment. Such classification must

not be 'purely arbitrary, oppressive or capricious.' American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 92. *But the mere production of inequality is not enough. Every selection of persons for regulation so results, in some degree. The inequality produced, in order to encounter the challenge of the Constitution must be 'actually and palpably unreasonable and arbitrary.'* Arkansas Natural Gas Co. v. Railroad Commission, 261 U. S. 379, 384, and cases cited." (Radice v. New York, supra, at page 296).

In assaying the classification under discussion, it is well to advert to some of the facts testified to at the hearing which were also before the legislators during the deliberations on the bill. The practice has grown up in the last few years of moving automobiles on their own wheels over the public highways of California to their place of sale. The movement is accomplished by fleets of cars of from eight to thirty or more cars, most of them joined in tandem with two cars driven by one driver. California is a large state with great distances. The caravaning of automobiles has increased traffic hazards, and resulted in many law violations and abuses. The abuses were found to exist only among persons who moved cars on their own wheels from without the state for the purpose of sale. To particularize the conditions and some of the abuses: The automobiles are moved in fleets by the tandem-towing method. Usually, there is no tail light on the towed car. The con-[fol. 136-38] trol of the two cars comes from the brakes of the first car. So the towed car may swing or skid or fail to followed the tow*ed* car on curves. The driver of the towing car has no clear back vision. The movement in fleets makes it difficult to pass caravans moving on the highway. When, as one officer testified, there is trouble and the caravan is halted, a traffic hazard arises. Many stolen and cars with fraudulent registrations are brought in in this manner. The type of drivers employed complicates the problem. They are usually persons without any permanent residence or visible means of support, driving the car not as an occupation, but merely for the purpose of obtaining transportation to California. They do not know the traffic laws of California. Conformance means nothing to them because once the state is reached, their objective has been attained, the El Dorado has been reached. Because these persons have no *o*permanent residence, giving them a sum-

mons to appear means nothing. In many instances, as the testimony showed, the persons cannot, later, be found. The only other alternative, that of arresting them for violation, makes confusion worse confounded. The officer must leave his place on the highway and take the offender before a magistrate. They drive long hours. Many of them have no places to sleep other than in the cars. They become fatigued and careless. All these facts are very important factors in the happening of accidents. Many of the cars so moved have foreign license plates. Without the Caravan Act, they could move over the highways of the state without registration and without identification. These facts present a serious evil with which the California Legislature sought to deal. The evil was of recent origin. There were no legislative precedents for any other method of combating it. The Legislature sought to remedy it by making a charge for the use of its highways for commercial purposes by persons caravaning automobiles. It defined caravaning as "the transportation from without the State of *any motor vehicle* operated on its own wheels or in tow of another motor vehicle, for the purpose of selling or offering the same for sale to or by any agent, dealer, manufacturers' representative, purchaser, or prospective pur- [fol. 136-39] chaser who may be located within or without this state". (Section 1, Statutes of 1935, Chapter 402, California Vehicle Code (1935), pages 174-175.) Had the Legislature sought to exclude single cars operated on their own wheels or units of one towed car, and confined the enactment to fleets of cars, such a classification might have been more difficult to defend than the present one. This because it might have been shown that all these cars originating out of the state caused the same difficulties, irrespective of the size of the caravan. So the Legislature included the whole class which experience had shown brought on the particular evil.

Ours is the duty to stay arbitrary power in legislative action. This duty, however, we must perform in the light of the doctrine laid down by Mr. Justice Roberts in Bordens' Farm Products v. Ten Eyck, supra, at page 473:

Judicial inquiry does not concern itself with the accuracy of legislative finding, but only with the question whether it so lacks any reasonable basis as to be arbitrary." (Italics added.)

In dealing with the exercise of the police power, fairly debatable questions as to "its reasonableness, wisdom and propriety are not for the determination of courts". (Standard Oil Company v. Marysville (1929), 279 U. S. 582, at 584.) Granted that the operation of the enactment may work to the advantage of the dealers in second hand automobiles who purchase automobiles within the State, it is not a constitutional objection to the exercise of the police power of a state that it may foster the development of one form of business and restrict another. (Fox v. Standard Oil Co. (1934), 294 U. S. 871; Sproles v. Binford (1932), 286 U. S. 374; Aero Interstate Co. v. Georgia Commission, supra; Hicklin v. Coney, supra.)

To my way of thinking, the Act contains no discrimination between interstate and intrastate commerce. Nor between persons engaged in the same business and operating the same or similar types of vehicles. The Act aims to cover only one group shown to exist—a group residing within the State, endeavoring to use the highways of the State for the purpose of caravaning vehicles originating [fol. 136-40] out of the State for sale. There is no evidence to show there are any caravans originating within the State operating either between various points within the State or going out of the State. The only Caravaning within the State testified to at the trial was caravaning of automobiles originating outside of the State, in their course, between various points within the State, to their destination. The fee charged is a flat fee and its size is not such as to warrant the conclusion that it is unreasonable. I am thus unable to see in the enactment the violation of either the commerce or the due process or equal protection clauses of the United States Constitution.

Hence my dissent from my brethern.

Dated this 5th day of May, 1936.

Leon R. Yankwich, U. S. District Judge.

(Indorsed:) Filed May 5, 1936. R. S. Zimmerman, Clerk, by Louis J. Somers, Deputy Clerk.

[fol. 137] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF THE POINTS TO BE RELIED UPON BY APPELLANTS, AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed October 10, 1936

Come now the Appellants above named, and in compliance with Par. 9 of Rule 13 of the Rules of the Supreme Court, state:

I

The points to be relied upon by appellants are:

The District Court erred in entering its final decree permanently enjoining the defendants (appellants) from enforcing against plaintiff (appellee) the provisions of Chapter 402, Statutes of 1935 of California, and exonerating the bonds given by plaintiff under the temporary restraining [fol. 138] orders herein; and erred in making and entering its findings of fact and conclusions of law; in the following respects:

1

The District Court erred in holding Chapter 402, Statutes of 1935 of California, to be in violation of the Commerce Clause of Section 8 of Article One of the Constitution of the United States, because Chapter 402 does not discriminate against nor impose an unconstitutional burden upon interstate commerce nor otherwise conflict with the Commerce Clause.

2

The District Court erred in holding Chapter 402, Statutes of 1935 of California, to be in violation of the "equal protection of the laws" clause of Section One of the Fourteenth Amendment to the Constitution of the United States, because Chapter 402 does not unconstitutionally discriminate against plaintiff or any other person or deny to plaintiff the equal protection of the laws.

3

The District Court erred in holding Chapter 402, Statutes of 1935 of California, to be in violation of the "due process of law" clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, because Chapter 402 does not impose unreasonable require-

ments upon plaintiff and does not deprive him of property without due process of law.

4

The District Court erred because on the entire record the plaintiff has failed to sustain the burden of overcoming the presumption of the correctness of the judgment of the Legislature that a valid need of legislation existed and that the class defined in Chapter 402, Statutes of 1935 of [fol. 139] California, includes the entire class properly the subject of such legislation, and has failed to overcome the presumption that Chapter 402 is reasonable and non-discriminatory.

5

The District Court erred in making affirmatively stated findings of fact (22) and (26) to the effect that Chapter 402, Statutes of 1935 of California, discriminates against plaintiff in his operations in interstate commerce in favor of intra-state commerce, because the evidence on the entire record is insufficient to overcome the presumption of the propriety and non-discrimintory character of the classification made by such Act, and because the evidence shows that the class defined in said Act is a distinct class constitutionally subject to separate classification, and that there is no other motor vehicle traffic in California in either intra-state or interstate commerce similar or comparable to that conducted by the included class.

6

The District Court erred in making affirmatively stated findings of fact (8), the last sentence of (9), and (27), and negatively stated findings of fact (4), (6), (7), and (8), to the effect that there are no unusual or serious safety, traffic or police problems created by the movement of vehicles on their own wheels into California for purpose of sale, because the evidence on the entire record is insufficient to overcome the presumption of the correctness of the judgment of the legislature that such problems existed and merited the enactment of Chapter 402, Statutes of 1935 of California, and because the evidence shows that the class defined in Chapter 402 conducts a specialized form of highway traffic, substantially distinct from other traffic, which

[fol. 140] creates substantial safety, traffic and police problems differing from those of other traffic.

7

The Court erred in making affirmatively stated findings of fact (11) and (19) to the effect that plaintiff's sole occupation is that of dealer in automobiles, and in making negatively stated finding of fact (2) that plaintiff's use of the highways is not an extraordinary use or for direct gain or profit or as a place of business, because the allegations of plaintiff's bill of complaint and the evidence show that the principal element of plaintiff's occupation is that of transporting automobiles upon the highways on their own wheels to market for commercial gain.

8

The Court erred in making affirmatively stated finding of fact (20) and negatively stated finding of fact (1), to the effect that Chapter 402, Statutes of 1935 of California, does not exact a charge for the use of the public highways, because the same are not findings of fact but are conclusions as to the interpretation of the terms of the statute not aided by or based on any evidence; and because such Act by its terms shows, and the evidence shows, that the permit fee it requires is exacted, at least in part, as a charge for the use of the public highways for commercial gain.

9

The Court erred in making affirmatively stated findings of fact (21) and (22) to the effect that the permit fee required by Chapter 402, Statutes of 1935 of California, is arbitrarily fixed and unreasonable in amount, because such fee is a police power license fee and is a tax for a commercial use of the highways, and the evidence does not show [fol. 141] that the amount of the fee is excessive either as a police power license fee, or as a tax for the use of the highways; or as both.

10

The Court erred in making affirmatively stated findings of fact (19), (25) and (27) and negatively stated findings of fact (3) to the effect that plaintiff brings cars in singly and not in groups, because the evidence is insufficient to

show that plaintiff does so, but does show that the regular and prevailing practice of those within the class defined in Chapter 402, Statutes of 1935 of California, is to move vehicles in fleets and that plaintiff regularly follows the prevailing practice.

11

The Court erred in making affirmatively stated findings of fact (15), (16), (17), and (7), to the effect that plaintiff attempted to move three particularly described vehicles into California, one singly and two joined, but not in groups with other vehicles, and that plaintiff's specific complaint in this case is the demand by defendants that plaintiff pay upon such specific vehicles the permit fee required by Chapter 402, Statutes of 1935 of California, because plaintiff's bill of complaint does not allege a practice of moving vehicles singly and not in fleets and does not predicate any special claims of unconstitutionality on the ground that the Act applies to singly moved vehicles, but said bill alleges generally that Chapter 402 is entirely invalid and asks that the entire enforcement thereof be enjoined, and does not seek relief with respect to singly moved vehicles or any particular vehicles; and because plaintiff's bill does not claim and the evidence does not show that the vehicles [fol. 142] particularly described in said bill were driven singly and not as part of a fleet; and because there is no evidence of the moving by the plaintiff of the vehicles or of any particular vehicle.

12

The Court erred in making affirmatively stated findings of fact (19) and (14), to the effect that to require plaintiff to pay the fifteen dollars permit fee for each automobile would absorb his profit and ruin his business and a large part of the used car business in California, because there is no evidence to support such finding and because the evidence affirmatively shows the condition of the used car market in California to be such that the purchasers would absorb such permit fee cost.

13

The Court erred in making affirmatively stated findings of fact (7), (23), (27), and (31) in so far as the same attempt to construe Chapter 402, Statutes of 1935 of Califor-

nia, because the same are not findings of fact but are argumentative conclusions as to the construction of Chapter 402 based solely upon the terms of the Act and not upon evidence; and because the evidence sustains the judgment of the legislature as to the necessity of the legislation and the propriety of the classification.

14

The Court erred in making affirmatively stated findings of fact (4) and (6) an dnegatively stated finding of fact (5), because the same are not findings of fact, but are argumentative legal propositions and are incorrect as such.

[fol. 143] II

The parts of the record necessary for the consideration of said points and which should be printed are:

1. Plaintiff's bill of complaint.
2. Temporary restraining order and order to show cause, and returns showing service thereof.
3. Joint return to order to show cause, and joint answer, of all of the defendants.
4. Statement of the evidence, with stipulation approving same, and order and certificate approving such statement.
5. Amended Opinion of the Court.
6. Dissenting Opinion of Judge Yankwich.

(NOTE.—The amended Opinion and the Dissenting Opinion are included in the Statement of Jurisdiction. Please print as part of printed record.)

7. Findings of Fact and Conclusions of Law.
8. Defendants' Exceptions to Findings of Fact and Conclusions of Law.
9. Final Decree.
10. Orders substituting Howard E. Deems as Registrar of the Motor Vehicle Department of the State of California, as a party defendant in place of Russell Bevins, and substituting Ray Edgar as a member of the State Board of Equalization in place of Orfa Jean Shontz.
11. Petition for Appeal to Supreme Court of the United States.
12. Statement of Jurisdiction of the Supreme Court of the United States (as required by Rule 12).
13. Assignment of Errors and prayer for reversal.

14. Order allowing appeal to Supreme Court of United States.

15. Proof of service of copies of the petition for appeal, statement of jurisdiction, assignment of errors, and order allowing appeal, and acceptance of service thereof by Pierson & Block and Ralph K. Pierson as attorneys for Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company (as required by Rule 12).

[fol. 144] 16. Notice of Appearance of Pierson & Block as attorneys of record for United States Fidelity and Guaranty Company and Continental Casualty Company, appellees, and acknowledgment of service of documents (as required by Rule 12).

17. Citation to appellees.

18. Præcipe for Transcript of Record on appeal with stipulation attached.

19. The foregoing Statement of Points and Designation of Parts of the Record to be printed.

U. S. Webb, Attorney General of California, by Frank Richards, James A. Howie, Deputy Attorneys General, Counsel for Appellants.

Service of the foregoing Statement of the Points to be Relied Upon, and Designation of the Parts of the Record to be Printed, and receipt of copy thereof, is acknowledged this 8th day of October, 1936.

Howard Morf, Doing Business under the Firm Name and Style of Pacific Wholesale Automobile Company; United States Fidelity and Guaranty Company, a Corporation, and Continental Casualty Company, a Corporation, Appellees, Pierson & Block, by Samuel P. Block, Their Attorney.

[fol. 145] [File endorsement omitted.]

Endorsed on cover: File No. 40,996. S. California, D. C. U. S. Term No. 456. Ray Ingels, as Director of the Motor Vehicle Department of the State of California, et al., Appellants, vs. Howard Morf, Doing business under the firm name and style of Pacific Wholesale Automobile Company, et al. Filed October 10, 1936. Term No. 456, O. T., 1936.

(8468-C)

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IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

In Equity.

No. 759-S.

HOWARD MORF, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF PACIFIC WHOLESALE AUTOMOBILE COMPANY,
Plaintiff and Appellee;
UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION, AND CONTINENTAL CASUALTY COMPANY, A CORPORATION,
Sureties on Bonds Filed by Plaintiff and Appellees,

vs.

RAY INGELS, AS DIRECTOR OF THE MOTOR VEHICLE DEPARTMENT OF THE STATE OF CALIFORNIA, HOWARD E. DEEMS, AS REGISTRAR OF THE MOTOR VEHICLE DEPARTMENT OF THE STATE OF CALIFORNIA, JOHN C. CORBETT, FRED E. STEWART, R. E. COLLINS, RAY EDGAR AND RAY L. RILEY, AS MEMBERS OF THE STATE BOARD OF EQUALIZATION AND CONSTITUTING SAID BOARD IN THE STATE OF CALIFORNIA, AND E. SEYMOUR,
Defendants and Appellants.

STATEMENT OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

The defendants, by their solicitors, do on this 14th day of August, 1936, at the time of filing and presenting their peti-

tion for appeal to the Supreme Court of the United States from the final decree entered in this cause by the District Court of the United States for the Southern District of California, Central Division, on the 8th day of June, 1936, file and present to the District Court this Statement that the basis of the jurisdiction of the Supreme Court to review said final decree upon appeal is the following:

(*a*) The statutory provisions believed to sustain the jurisdiction of the Supreme Court of the United States are Par. (3) of Section 238, and Section 266, Judicial Code, as amended (U. S. C., Title 28, Sections 345, Par. (3), and 380).

(b) The validity of Chapter 402, Statutes of 1935 of the State of California (found on page 1453 of said Statutes of 1935 of the State of California), is involved in this cause. It is set out *verbatim* on pages four to seven of this statement.

(c) The final decree of the District Court of the United States for the Southern District of California, Central Division, sought to be reviewed was entered on June 8, 1936, and the application for this appeal was presented to the District Court on August 14, 1936, and the order of the District Court allowing this appeal was entered on said date.

Said final decree was entered by a District Court of Three Judges (one Judge dissenting), and enjoined defendants (appellants), officers of the State of California, from enforcing said chapter 402, Statutes of 1935 of the State of California, on the ground that said statute violates the Constitution of the United States.

Cases which sustain the jurisdiction of the Supreme Court are *Morf* v. *Bingaman* (United States Supreme Court, No. 772, October Term, 1935, decided May 18, 1936); *Clark* v. *Poor*, 274 U. S. 554; and *Bingaman* v. *Golden Eagle*

Western Lines (U. S. Supreme Court, No. 520, October Term, 1935, decided March 30, 1936).

The plaintiff (appellee), by his bill of complaint in equity filed in the District Court, alleged that Chapter 402, Statutes of 1935 of California, unconstitutionally violates his rights protected by the Commerce Clause of Section 8 of Article 1 of the Constitution of the United States, and by the Equal Protection of the Laws and Due Process of Law Clauses of Section One of the Fourteenth Amendment to the Constitution.

Said bill of complaint prayed that a temporary restraining order issue forthwith enjoining defendants (appellants) from enforcing said Chapter 402 against plaintiff (appellee); and prayed that order issue directed to defendants to show cause why interlocutory injunction should not issue enjoining defendants (appellants) as aforesaid; and prayed for final decree of injunction as aforesaid.

On September 25, 1935, as prayed in said bill of complaint, a temporary restraining order issued restraining defendants (appellants) from enforcing said statute against plaintiff (appellee), upon plaintiff's filing bond conditioned as required by law in the sum of $2,000.00, which was done, with United States Fidelity and Guaranty Company, a corporation, as surety thereon; an order issued directed to defendants (appellants) to show cause why an interlocutory injunction restraining them as aforesaid should not issue. Defendants (appellants) filed answer and return to said show cause order on October 22, 1935, denying plaintiff's (appellant's) claims and asserting said statute to be constitutional.

The aforesaid temporary restraining order was continued in force until entry of final decree herein, and while said order remained in force plaintiff (appellee) filed additional bonds from time to time as required in said order

with the aforesaid surety thereon, and one bond with Continental Casualty Company, a corporation, as surety.

On November 29, 1935, as prayed in said bill of complaint a District Court of three judges (Clifton Mathews, Judge of the Ninth Circuit Court of Appeals, and Albert Lee Stephens and Leon R. Yankwich, Judges of the United States District Court of the Southern District of California) was convened to hear said cause, as provided by Section 266 Judicial Code, as amended (Sec. 380, Title 28, U. S. C.), upon plaintiff's (appellee's) application for interlocutory injunction. Evidence was introduced by plaintiff and by defendants, and it was stipulated that final decree could be entered by the Court upon the record made.

On May 5, 1936, the Court, Judge Yankwich dissenting, filed its opinion holding said Chapter 402 unconstitutional. The dissenting judge filed a separate opinion. Both opinions are attached hereto.

On June 8, 1936, the Court entered its final decree, one judge dissenting, permanently enjoining defendants (appellants) from enforcing said Chapter 402 against plaintiff (appellee) and exonerating the bonds given by plaintiff (appellee) under said restraining order.

Said Chapter 402, Statutes of 1935 of California, is as follows:

CHAPTER 402, STATUTES OF 1935.

AN ACT TO REGULATE THE CARAVANING OF MOTOR VEHICLES UPON THE PUBLIC HIGHWAYS OF THIS STATE, DEFINING THE TERM "CARAVANING" AND IMPOSING PENALTIES FOR VIOLATION THEREOF.

(Approved by the Governor, July 6, 1935, in effect September 15, 1935.)

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The term "caravaning" as used in this act shall mean the transportation from without the

State of any motor vehicle operated on its own wheels, or in tow of another motor vehicle, for the purpose of selling or offering the same for sale to or by any agent, dealer, manufacturers' representative, purchaser or prospective purchaser, whether such agent, dealer, manufacturers' representative, purchaser or prospective purchaser may be located within or without this State. The caravaning of motor vehicles as herein defined shall be considered as the transportation of property for hire by motor vehicle and shall be subject to all the laws of this State relative to the transportation of property for hire by motor vehicle upon the public highways of this State.

SEC. 2. No person, firm or corporation, shall use any highway in this State for caravaning motor vehicles unless and until there shall first have been secured from the Motor Vehicle Department of the State of California a special permit as to each vehicle so caravaned, for use of the highways of this State in caravaning such vehicle, which permit shall be displayed by posting the same upon the windshield of such vehicle or in other prominent places thereon where it may be readily legible. It shall be unlawful to operate three or more vehicles or groups of vehicles in caravan unless a space of at least one hundred fifty feet shall at all times be maintained between each vehicle or group of vehicles being so caravaned.

SEC. 3. As a condition precedent to the issuance of any special permit provided for in the previous section of this act the Motor Vehicle Department of the State of California shall charge and collect a fee of fifteen dollars for each motor vehicle for which a caravan permit may be issued, whether such vehicle be operated under its own power or in tow of another motor vehicle; provided, however, that no such permit shall be issued by said Motor Vehicle Department unless and until the applicant therefor shall have produced evidence to the satisfaction of said Motor Vehicle Department that all of the laws of this State re-

lating to the transportation of property upon the public highways for hire shall have been complied with.

SEC. 4. No permit issued under this act for caravaning motor vehicles or vehicles shall be transferable either as between persons or as to the vehicle for which it is issued, and shall only be valid for the trip or trips to be specified in said permit, and in no event shall such permit be valid for a period of more than ninety days after it shall have been issued. Such permit shall contain such information and be in such form and shall be issued under such rules and regulations as may be prescribed by said Motor Vehicle Department. Such permit shall be conditioned upon the permitee complying with all laws of the State of California and the United States.

SEC. 5. The fee paid for any caravaning permit issued under this act shall be in lieu of all other registration fees and license fees for the use of public highways in this State by motor vehicle during the period that such motor vehicle may be operated under and in accordance with such permit upon the public highways in this State; provided, however, that nothing in this section shall exempt the owner or operator of such vehicle from compliance, except with respect to fees or license charges, with all laws of this State now or hereafter adopted, relating to the transportation of property for hire.

SEC. 6. All fees from the issuance of permits collected by the Motor Vehicle Department under this act shall be paid into the general fund in the State treasury. Said department shall file with the Controller on or before February first and August first of each year a detailed account of the receipts of said Department from this source for the six months next preceding. The moneys so derived by the State are intended to reimburse the State Treasury for the added expense which the State may incur in the administration and enforcement of this act and the added expense of polic-

ing the highways over which such caravaning may be conducted, so as to provide for the safety of traffic on such highways where caravaning is being conducted.

SEC. 7. Violation of the provisions of section 2 or of section 4 of this act is a misdemeanor punishable by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

The basis of plaintiff's (appellee's) complaint was that he purchases passenger automobiles in states east of California, has them driven on their own wheels from there to his place of business in Los Angeles, California, for the purpose of selling them, and there sells them; and that said Chapter 402 unconstitutionally burdens interstate commerce conducted by plaintiff (appellee), discriminates against him, and deprives him of his property without due process of law, in violation of the Commerce Clause and the Equal Protection of the Laws and Due Process of Law Clauses of the Fourteenth Amendment.

Defendants' (appellants') position is that the class defined and included in said Chapter 402 is a distinct class carrying on business on the State's highways for commercial gain in a substantially different way than any persons not included within the class; that the act does not discriminate against the class therein defined because there are no persons not included within the class who conduct operations by motor vehicle similar to the operations of the included class, either in intrastate or interstate commerce; that the act only requires the payment of a police power license fee and a charge for the use of the State's highways and such fee is reasonable in amount.

The questions involved are substantial. The enforcement of a statute deemed by the Legislature and the officials of the State to be necessary to the State's welfare is sus-

pended, and the questions of law involved were settled largely, if not entirely, in favor of the validity of said Chapter 402 by the decision of the Supreme Court of the United States in *Morf* v. *Bingaman*, decided May 18, 1936.

Respectfully submitted,

U. S. WEBB,
Attorney General of the State of California;

By FRANK RICHARDS,
Deputy Attorney General of the State of California;
Solicitors for Defendants and Appellants.

EXHIBIT "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

Eq. No. 759-S.

HOWARD MORF, Doing Business under the Firm Name and Style of Pacific Wholesale Automobile Company, *Plaintiff*,

vs.

RAY INGELS, as Director of the Motor Vehicle Department of the State of California, RUSSELL BEVINS, as Registrar of the Motor Vehicle Department of the State of California, JOHN C. CORBETT, FRED E. STEWART, R. E. COLLINS, ORFA JEAN SHONTZ and RAY L. RILEY, as Members of the State Board of Equalization and Constituting Said Board, in the State of California, and E. SEYMOUR, *Defendants.*

Appearances:

For Plaintiff: Pierson & Block, by Ralph K. Pierson and Samuel P. Block.

For Defendants: U. S. Webb, Attorney General, by Frank Richards, Deputy Attorney General.

Before Mathews, Circuit Judge, Stephens and Yankwich, District Judges.

Opinion by STEPHENS, *District Judge:*

The plaintiff seeks to enjoin state officials from enforcing a state law which allegedly invades his rights under the Federal Constitution. Upon issue joined, the case was tried and submitted for decision in a three judge court.

For several years automobiles have been transported upon their own wheels from eastern points for sale in California. The practice increased so that automobiles, or

cars, as we shall hereafter generally refer to them, were being brought into California singly and in fleets of from three to forty. In the fleets which were commanded by experienced men there were single cars and cars that were linked together the leading one pulling the other. Up to November 29th last, about fourteen thousand cars had been rolled into the state during the year, and it is safe to say that the number exceeded fifteen thousand for the full year. The fleet movement caused certain traffic difficulties such as passing the fleet and meeting cars while passing it. The fleet would sometimes stop, affecting the flow of traffic. When motor police would stop a car in the fleet, those following would sometimes drive so as to interfere with other traffic. The drivers were not always careful as to their automobile lights and the towed car sometimes swayed. Some of the drivers were unfamiliar with California traffic regulations and some were fatigued.

Plaintiff is a wholesale dealer of used cars with his principal place of business in Los Angeles. He sells cars for delivery in other parts of the state and a smaller number for delivery in the north Pacific states. He buys cars and brings them into California singly and by twos coupled and sometimes in fleets of several. The cars are operated directly under his supervision and responsibility and not under contract. Although he has been operating this way for several years no traffic trouble has occurred in connection with his activity. The specific complaint in this case is the demand for a license fee for driving a single car not in fleet across the California line from Arizona. Plaintiff's business is large and lucrative but it would appear that the required $15.00 license fee for each car he brings into California would practically absorb his net profit and would ruin his business. It is a serious situation for him and others in like circumstances.

The Basic Theory of National Unity and Equality of the Laws.

Preferential laws for state industries and the rivalry for foreign commerce prompted the enactment of tariffs against foreign imports between the states under the old Federa-

tion. This situation was very detrimental to national peace and unity and was one of the primary causes for the Constitutional requirement that "all duties, imposts and excises shall be uniform throughout the United States" and for the constitutional provision that Congress should have the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes" (Art. I, sec. 8), and that "no state shall, without the consent of Congress, lay any duty on tonnage" (Art. I, sec. 10). Through the Fifth and the Fourteenth Amendments the Constitution has provided for the security of property and for the personal freedom from arbitrary state action under the clauses requiring due process of law and the equal protection of the laws. In many instances the states have legislated in contravention of these "equality" principles, a practice certainly to be guarded against with vigilance equal to that we should use against encroachment of national legislation upon the reserved rights of the states. Through the years the courts have met the difficult problems of construing the enacted statutes under these constitutional rules.

No nice and undeviating line has been discovered marking legislation on the one side in harmony with these constitutional provisions and on the other in conflict with them, but action has been held within a fairly narrow zone of deviation, under new and changing conditions, through the process of classification.

> "The equal protection of the law means subjection to equal laws applying alike to all in the same situation. While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed."
>
> *So. Ry. Co.* v. *Green*, 216 U. S. 400;
> *Darnell & Son* v. *Memphis*, 208 U. S. 113, at 120;
> *Continental Baking Co. et al.* v. *Woodring*, 286 U. S. 352.

Classification Cannot Be Sustained.

The California legislature of 1935 legislated extensively upon the subject of motor transportation. It adopted "The Vehicle Code" and many other acts relating to the subject of motor transportation, including the so-called Caravan Act (c. 402, Stat. 1935), hereunder consideration. In section 146.5 of the vehicle code it provided for the registration of cars previously registered outside California. This District Court sitting as a three judge court recently declared this section unreasonable, discriminatory, and void. (Asher & Ponder v. Ingels et al., No. 8144.) Ostensibly its purpose was to prevent the importation of stolen cars into California; actually it practically prohibited the sale of cars in California that had been registered elsewhere. We have referred to these several acts to show that the legislature covered the subject of motor vehicle transportation comprehensively and, through separate but related acts sought to apply its legislative discretion to all conditions it deemed desirable to treat. The purpose of each act is more easily understood and the expressed purpose in each act becomes more definitely a limitation upon its basic theory and purpose through such information.

The term "caravan" as applied to and used in the act under consideration is a misnomer and leads to misunderstandings. In a metaphoric sense it has come to mean a considerable number of persons journeying in company by several or many vehicles. Fleet movement of cars may with propriety be termed caravans.

But the so-called "caravan act" although including such fleet movement of cars as hereinbefore described is by no means limited thereto. In fact it straightway defines the term "caravaning" as the movement of a single car upon its own wheels into California to be sold. There is nothing in the act that even refers to caravaning as that term is commonly understood, except that not more than three "vehicles or groups of vehicles" can be operated legally upon the highways unless spaced 150 feet. But this provision applies only to cars for sale that are rolled by highway into California upon their own wheels. There is nothing in the act indicating that the legislature has determined

that the practice of bringing cars into California for sale in this way is undesirable or that the act is intended to prevent, limit, or regulate the practice, except as to the spacing mentioned. There is nothing in the evidence that indicates any police problem resulting from the use of the highway except through fleet or caravan formation. Yet the act is specifically directed to each and every car falling within the prescribed specifications in fleet or not, to-wit, entering California upon its own wheels and being for sale.

The Supreme Court in *Darnell & Son* v. *Memphis, supra,* quoted the following from *Guy* v. *Baltimore,* 100 U. S. 434, with approval:

> "In view of these and other decisions of this court, it must be regarded as settled that no state can, consistently with the Federal Constitution, impose upon the products of other states, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other states, more onerous public burdens or taxes than it imposes upon the like products of its own territory. If this were not so, it is easy to perceive how the power of congress to regulate commerce with foreign nations and among the several states could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several states be materially abridged and impaired."

See also *Smith* v. *Cahoon,* 283 U. S. 553.

Most, if not all, of the cases relied upon for the validity of the Act are common carrier cases. Cases arising from the business of selling transportation upon and along the public highways. In such cases, subject to reasonableness and to the interstate commerce clauses of the Federal Constitution, the state denies, permits, regulates, and licenses such businesses. The permits issued and license fees paid are for continuing operation. The vehicles used are usually large and heavy, burdening the road and its roadbed. The difference is obvious between such cases and the instant one, where only ordinary automobiles for which the high-

ways were primarily constructed are transported ove
but a few miles of highway and for but a few days (usuall
not a whole day), under the license permit. Expression
in opinions of courts must be read accordingly. It mus
always be borne in mind that plaintiff is not a common car
rier, accepts no article for transportation for hire, an
transports only his own property. It would appear tha
plaintiff has as good a right to the free use of the highway
as anyone else transporting his own goods; subject o
course to such police regulation as is reasonable in the cir
cumstances, including a reasonable inspection fee unde
proper classification. The basic theory of the Act, tha
such use of the highways brings the principles of trans
portation for hire into play, is erroneous. Taxes on busses
truck lines, etc., are based upon privileges granted, bu
plaintiff need not ask the privilege of using the highways
He has an equal right thereto with the general public. Se
Packard v. *Banton*, 264 U. S. 140; also *Buck* v. *Kuykendall*
267 U. S. 307, at 314.

There is no doubt that classification to be legal need no
approximate perfection and as said in *Patisone* v. *Pennsyl
vania*, 232 U. S. 138, the legislature "may direct its law
against what it deems the evil as it actually exists withou
covering the whole field of possible abuses." There ar
single and fleet movements of cars for sale from point t
point within the state, and there are other instances o
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as well as across the state lines. Instance the grouping o
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hauling from three to five automobiles upon one long truc
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case, such instances do not necessarily invalidate a classifi
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defining elements of the Caravan Act classification are no
elements of the wrong aimed at and do not gather togethe
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embrace innocent actors. It should be noticed that the Ac
extends its burdens to singly driven cars that do not ad
any specific police burden. These cars come into sales com
petition with cars driven wholly within the state for sale

The License Fee of $15.00 *Per Car is Arbitrarily Fixed and Unreasonable in Amount.*

The purpose of assessing a fee for each car admitted, expressed in the Act, is to defray the expenses of adequately policing the highways where used in this importing practice, together with the administrative expense of the Act. The full sum collected goes into the general state fund. It is argued that the state may charge for the commercial use of its highways. We have already stated that the use plaintiff makes of the highways is not a privilege that will support a tax. But aside from that there is no basis in the act for a highway tax. As to purposes of fee, see: *Interstate Transit Inc.* v. *Lindsey,* 283 U. S. 183; *Kane* v. *New Jersey,* 242 U. S. 160; *Sprout* v. *South Bend,* 277 U. S. 163, at 170 and 171; *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245.

There is a provision of the act to the effect that the licensing fee of $15.00 per car is in lieu of all other fees, but this is meaningless. It merely exempts the importing car operator from paying fees required of carriers defined and provided for in the other motor vehicle acts. But there is nothing in any act that requires the payment of any such fees by plaintiff or persons in his circumstances. The purchaser of the imported car must pay the regular state automobile license fee and must pay the property taxes placed upon the car in the same manner as upon any other car and to the same extent. The $15.00 fee cannot be bolstered into reasonableness through recital in the act of unreal benefits to the licensee.

Although there is language in the act that might seem to require it, we think no pains need be taken to discuss in full the claim of plaintiff that he need pay a $25.00 fee (it has not been demanded) before applying for the special permit hereinbefore mentioned nor that he is compelled against his will and against the facts obtaining, to assume the status of a common carrier or a carrier for hire (California Carriers' Act.) The so-called Caravan Act itself excludes such fee and if the law attempts to fix upon plaintiff a status not justified by the facts, it goes beyond the

power of the legislature and is to that extent void as to him. *Frost Trucking Co.* v. *R. R. Comm.*, 271 U. S. 583. It does not affect the other part of the statute, however, and is severable. For the theory of levying tax on vehicles using highways see *Interstate Transit Inc.* v. *Lindsey*, 283 U. S. 183; *Mallory* v. *Alabama*, 296 U. S. 261; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245.

We have examined the California Carriers' Act (c. 223, Stat. 1935) and find that it does not affect plaintiff in any but in the most incidental and inconsequential manner, if at all.

We come directly to the reasonableness of the license fee. As shown by the evidence in this case, during the year 1935 a great increase of automobile use of the highways occurred and for that year at least 15,000 cars were brought into the state for sale. The mileage for such cars within the state and the operation upon the highways under the permit is, of course, very little. They go only to the market place. The increased personnel of motor policemen along the routes used by these fleets, for care of all traffic conditions during 1935 up to date of hearing, amounted to but six, although a few more could be used handily. The salary of such officer averages around $200.00 per month. A few inspectors at the border offices have been put on since the passage of the law and there is some clerical expense. Even if the whole increase of expense just indicated were charged to "caravaning" it would seem mathematically demonstrable that the figure of $15.00 per each imported car was not fixed upon any basis of compensating the state for policing and for administering the act. The evidence would indicate that ten additional employees would more than take care of the situation, including the generally increased traffic. Allowing $200.00 per month each, the sum would amount to $2,400.00 or for ten men $24,000.00 per year. Fifteen thousand cars at $15.00 per car would produce $225,000. Or looking at it in another way the distance from border point to point of destination can be traversed in less than a day. The $30.00 charge for each operating unit of two cars would pay for a special police patrol and even under such regulation a great profit

would result. Of course, there is no contention that such a service is required. There can be no doubt but that the license fee is excessive and arbitrary.

The Deputy Attorney General argues that the highways belong to the people and that their use for commercial purposes can be charged for and he sought to show comparative railway charges for transporting automobiles. But this evidence has no materiality here. If the charge of $15.00 is intended as an equalization of transportation costs between railroads and highways, it rests upon an unsupportable premise.

The unreasonableness of the license charge discriminates against the plaintiff who brings cars into the state for sale in favor of those who deal in used cars obtained from within the state. The charge bears no reasonable relation to the purposes for which it is collected and in practical effect constitutes a protective tariff and is unconstitutionally burdensome. *Interstate Transit, Inc.*, v. *Lindsey*, 283 U. S. 183; *Young's Market Co.* v. *Board of Equalization*, 12 Fed. Supp. 140, and cited authorities.

The clear statement of principles in *Baldwin* v. *Seelig*, 294 U. S. 511, at 521, 523, inclusive, may be related to the instant case. Mr. Justice Cardozo likens the attempt by the New York Legislature to fix milk producers' prices in Vermont on a par with those of New York, as a condition of its sale in New York, to customs duties. He says, "Such a power, if exerted, will set a barrier to traffic between one state and another, as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed by an express prohibition of the Constitution, beyond the power of a state: 'Except what may be absolutely necessary for executing its inspection laws. * * *' Constitution, Article I, Section 10, clause 2: * * * 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.' *International Textbook Co.* v. *Pigg*, 217 U. S. 91; 112;"

To burden the movement of plaintiff's own property with a substantial tax, when that sum bears no reasonable rela-

tion to the express use of and cause of the levy, constitutes nothing less than customs duty. To declare such tax legal as an exception would, to use the apt words of the Justice above quoted, "be to eat up the rule under the guise of an exception." Other cases of interest by analogy are *Voight* v. *Wright*, 141 U. S. 62; *Brimmer* v. *Rebman*, 138 U. S. 78; *Webber* v. *Virginia*, 103 U. S. 344.

The state cannot exact an arbitrary toll for revenue from any class of highway users. *Interstate Transit Inc.* v. *Lindsey, supra; Sprout* v. *City of South Bend*, 277 U. S. 169.

Judgment will go for plaintiff. A permanent injunction will issue and the bonds given under the temporary restraining order will be exonerated.

Dated May 5th, 1936.

CLIFTON MATHEWS,
Circuit Judge.

ALBERT LEE STEPHENS,
District Judge.

(Not Signed) LEON R. YANKWICH,
District Judge.

(Indorsed:) Filed May 5, 1936. R. S. Zimmerman, Clerk, by Louis J. Somers, Deputy Clerk.

EXHIBIT "B".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

Eq. No. 759-S.

HOWARD MORF, Doing Business under the Firm Name and Style of Pacific Wholesale Automobile Company, *Plaintiff*,

vs.

RAY INGELS, as Director of the Motor Vehicle Department of the State of California, RUSSELL BEVINS, as Registrar of the Motor Vehicle Department of the State of California, JOHN C. CORBETT, FRED E. STEWART, R. E. COLLINS, ORFA JEAN SHONTZ and RAY L. RILEY, as Members of the State Board of Equalization and Constituting Said Board, in the State of California, and E. SEYMOUR, *Defendants.*

Amended Opinion.

APPEARANCES:

For Plaintiff: Pierson & Block, by Ralph K. Pierson and Samuel P. Block.

For Defendants: U. S. Webb, Attorney General, by Frank Richards, Deputy Attorney General.

Before Mathews, Circuit Judge, Stephens and Yankwich, District Judges.

Opinion by STEPHENS, *District Judge:*

The plaintiff seeks to enjoin state officials from enforcing a state law which allegedly invades his rights under the Federal Constitution. Upon issue joined, the case was tried and submitted for decision in a three judge court.

For several years automobiles have been transported upon their own wheels from eastern points for sale in

California. The practice increased so that automobiles, or cars, as we shall hereafter generally refer to them, were being brought into California singly and in fleets of from three to forty. In the fleets which were commanded by experienced men there were single cars and cars that were linked together, the leading one pulling the other. Up to November 29th last, about fourteen thousand cars had been rolled into the state during the year, and it is safe to say that the number exceeded fifteen thousand for the full year. The fleet movement where made up of more than four automobiles caused certain traffic difficulties such as passing the fleet and meeting cars while passing it. The fleet would sometimes stop, affecting the flow of traffic. When motor police would stop a car in the fleet, those following would sometimes drive so as to interfere with other traffic. The drivers were not always careful as to their automobile lights and the towed car sometimes swayed. Some of the drivers were unfamiliar with California traffic regulations and some were fatigued.

Plaintiff is a wholesale dealer of used cars with his principal place of business in Los Angeles. He sells cars for delivery in other parts of the state and a smaller number for delivery in the north Pacific states. He buys cars and brings them into California singly and by twos coupled and sometimes in fleets of several. The cars are operated directly under his supervision and responsibility and not under contract. Although he has been operating this way for several years no traffic trouble has occurred in connection with his activity. The specific complaints in this case are, first, the demand for a license fee for driving a single car not in fleet across the California line from Arizona, and, second, demands for license fees for so driving a car with another car attached. Between 30% and 40% of such imported cars are driven to and across the California state line singly and not in company with other automobiles. Plaintiff's business is large and lucrative but it would appear that the required $15.00 license fee for each car he brings into California would practically absorb his net profit and would ruin his business. It is a serious situation for him and others in like circumstances.

The Basic Theory of National Unity and Equality of the Laws.

Preferential laws for state industries and the rivalry for foreign commerce prompted the enactment of tariffs against foreign imports between the states under the old Federation. The situation was very detrimental to national peace and unity and was one of the primary causes for the Constitutional requirement that "all duties, imposts and excises shall be uniform throughout the United States" and for the constitutional provision that Congress should have the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes" (Art. I, sec. 8), and that "no state shall, without the consent of Congress, lay any duty on tonnage" (Art. I, sec. 10). Through the Fifth and the Fourteenth Amendments the Constitution has provided for the security of property and for the personal freedom from arbitrary state action under the clauses requiring due process of law and the equal protection of the laws. In many instances the states have legislated in contravention of these "equality" principles, a practice certainly to be guarded against with vigilance equal to that we should use against encroachment of national legislation upon the reserved rights of the states. Through the years the courts have met the difficult problems of construing the enacted statutes under these constitutional rules.

No nice and undeviating line has been discovered marking legislation on the one side in harmony with these constitutional provisions and on the other in conflict with them, but action has been held within a fairly narrow zone of deviation, under new and changing conditions, through the process of classification.

> "The equal protection of the law means subjection to equal laws applying alike to all in the same situation. While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real

and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed."

So. Ry. v. *Greene*, 216 U. S. 400;
Darnell & Son v. *Memphis*, 208 U. S. 113, at 120;
Continental Baking Co. et al. v. *Woodring*, 286 U. S. 352.

Classification Cannot be Sustained.

The California legislature of 1935 legislated extensively upon the subject of motor transportation. It adopted "The Vehicle Code" (St. 1935, p. 93) and many other acts relating to the subject of motor transportation, including the so-called Caravan Act (c. 402, Stat. 1935), hereunder consideration. In section 146.5 of the vehicle code it provided for the registration of cars previously registered outside California. This District Court sitting as a three judge court recently declared this section unreasonable, discriminatory, and void. (Asher & Ponder v. Ingels et al., No. 8144.) Ostensibly its purpose was to prevent the importation of stolen cars into California; actually it practically prohibited the sale of cars in California that had been registered elsewhere. We have referred to these several acts to show that the legislature covered the subject of motor vehicle transportation comprehensively and, through separate but related acts sought to apply its legislative discretion to all conditions it deemed desirable to treat. The purpose of each act is more easily understood and the expressed purpose in each act becomes more definitely a limitation upon its basic theory and purpose through such information.

The term "caravan" as applied to and used in the act under consideration is a misnomer and leads to misunderstandings. In a metaphoric sense it has come to mean a considerable number of persons journeying in company by several or many vehicles. Fleet movement of cars may with propriety be termed caravans.

But the so-called "caravan act" although including such fleet movement of cars as hereinbefore described is by no means limited thereto. In fact it straightway defines

the term "caravaning" as the movement of a single car upon its own wheels into California to be sold. There is nothing in the act that even refers to caravaning as that term is commonly understood, except that not more than three "vehicles or groups of vehicles" can be operated legally upon the highways unless spaced 150 feet. But this provision applies only to cars for sale that are rolled by highway into California upon their own wheels. There is nothing in the act indicating that the legislature has determined that the practice of bringing cars into California for sale in this way is undesirable or that the act is intended to prevent, limit, or regulate the practice, except as to the spacing mentioned. There is nothing in the evidence that indicates any police problem resulting from the use of the highway except through fleet or caravan formation. Yet the act is specifically directed to each and every car falling within the prescribed specifications, in fleet or not, to-wit, entering California upon its own wheels and being for sale.

The Supreme Court in *Darnell & Son* v. *Memphis, supra*, quoted the following from *Guy* v. *Baltimore*, 100 U. S. 434, with approval:

> "In view of these and other decisions of this court, it must be regarded as settled that no state can, consistently with the Federal Constitution, impose upon the products of other states, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other states, more onerous public burdens or taxes than it imposes upon the like products of its own territory. If this were not so, it is easy to perceive how the power of congress to regulate commerce with foreign nations and among the several states could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several states be materially abridged and impaired."

See also *Smith* v. *Cahoon*, 283 U. S. 553.

Most, if not all, of the cases relied upon for the validity of the Act are common carrier cases. Cases arising from

the business of selling transportation upon and along the public highways. In such cases, subject to reasonableness and to the interstate commerce clauses of the Federal Constitution, the state denies, permits, regulates, and licenses such businesses. The permits issued and license fees paid are for continuing operation. The vehicles used are usually large and heavy, burdening the road and its roadbed. The difference is obvious between such cases and the instant one, where only ordinary automobiles for which the highways were primarily constructed are transported over but a few miles of highway and for but a few days (usually not a whole day), under the license permit. Expressions in opinions of courts must be read accordingly. It must always be borne in mind that plaintiff is not a common carrier, accepts no article for transportation for hire, and transports only his own property. It would appear that plaintiff has as good a right to the use of the highways as anyone else transporting his own goods; subject, of course, to such police regulation as is reasonable in the circumstances. See *Packard* v. *Banton*, 264 U. S. 140; also *Buck* v. *Kuykendall*, 267 U. S. 307, at 314.

There is no doubt that classification to be legal need not approximate perfection and as said in *Patoine* v. *Pennsylvania*, 232 U. S. 138, the legislature "may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses." There are single and fleet movements of cars for sale from point to point within the state, and there are other instances of troublesome use of the highways in the State of California as well as across the state lines. Instance the grouping of large vision obscuring trucks with trailers, the practice of hauling from three to five automobiles upon one lock truck and trailer, and the trailer living quarters so greatly on the increase. Under the doctrine expressed in the Patisone case, such instances do not necessarily invalidate a classification. They are eloquent however of the fact that the definifg elements of the Caravan Act classification are not elements of the wrong aimed at and do not gather together the common malfactors but do arbitrarily and unreasonably embrace innocent actors. It should be noticed

that the Act extends its burdens to singly driven cars and *too* cars coupled together that do not add any specific police burden. These cars come into sales competition with cars driven wholly within the state for sale.

The License Fee of $15.00 Per Car is Arbitrarily Fixed and Unreasonable in Amount.

The purpose of assessing a fee for each car admitted, expressed in the Act, is to defray the expenses of adequately policing the highways where used in this importing practice, together with the administrative expense of the Act. The full sum collected goes into the general state fund. It is argued that the state may charge for the commercial use of its highways. We have already stated that the use plaintiff makes of the highways is not a privilege that will support a tax under the act for other than such extra policing reasonably required by fleet movement. But aside from that there is no basis in the act upon which a highway tax can be estimated or calculated. As to purposes of fee, see: *Interstate Transit Inc.* v. *Lindsey*, 283 U. S. 183; *Kane* v. *New Jersey*, 242 U. S. 160; *Sprout* v. *South Bend*, 277 U. S. 163, at 170 and 171; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245.

There is a provision of the act to the effect that the licensing fee of $15.00 per car is in lieu of all other fees, but this is meaningless. It merely exempts the importing car operator from paying fees required of carriers defined and provided for in the other motor vehicle acts. But there is nothing in any act that requires the payment of any such fees by plaintiff or persons in his circumstances. The purchaser of the imported car must pay the regular state automobile license fees and must pay the property taxes placed upon the car in the same manner as upon any other car and to the same extent. The $15.00 fee cannot be bolstered into reasonableness through recital in the act of unreal benefits to the licensee.

Although there is language in the act that might seem to require it, we think no pains need be taken to discuss in full the claim of plaintiff that he need pay a $25.00 fee (it has not been demanded) before applying for the special permit

hereinbefore mentioned nor that he is compelled agains his will and against the facts obtaining, to assume the statu of a common carrier or a carrier for hire (California Ca riers' Act). The so-called Caravan Act itself excludes suc fee and if the law attempts to fix upon plaintiff a status no justified by the facts, it goes beyond the power of the legis lature and is to that extent void as to him. *Frost Truck ing Co.* v. *R. R. Comm.*, 271 U. S. 583. It does not affect th other part of the statute, however, and is severable. Fo the theory of levying tax on vehicles using highways se *Interstate Transit Inc.* v. *Lindsey*, 283 U. S. 183; *Mallory* v *Alabama*, 296 U. S. 261; *Interstate Busses Corp.* v. *Blod gett*, 276 U. S. 245.

We have examined the California Carrier's Act (c. 223 Stat. 1935) and find that it does not affect plaintiff in an but in the most incidental and inconsequential manner, i at all.

We come directly to the reasonableness of the license fee As shown by the evidence in this case, during the year 193 a great increase of automobile use of the highways oc curred and for that year at least 15,000 cars were brough into the state for sale under conditions hereinabove recited The mileage for such cars within the state and the opera tion upon the highways under the permit is, of course, ver little. They go only to the market place. The increase personnel of motor policemen along the routes used b these fleets, for care of all traffic conditions during 1935 u to date of hearing, amounted to but six, although a few more could be used handily. The salary of such office averages around $200.00 per month. A few inspectors a the border offices have been put on since the passage of th law and there is some clerical expense. Even if the whol increase of expense just indicated were charged to "cara vaning" it would seem mathematically demonstrable tha the figure of $15.00 per each imported car was not fixe upon any basis of compensating the state for policing an for administering the act. The evidence would indicat that ten additional employees would more than take care o the situation, including the generally increased traffic. Al lowing $200.00 per month each, the sum would amount t

$2,400.00, or for ten men $24,000.00, per year. Fifteen thousand cars at $15.00 per car would produce $225,000.00. Or looking at it in another way, the distance from border point to point of destination can be traversed in less than a day. The $30.00 charge for each operating unit of two cars would pay for a special police patrol, and even under such regulations a great profit would result. Of course, there is no contention that such a service is required. There can be no doubt but that the license fee is excessive and arbitrary.

The Deputy Attorney General argues that the highways belong to the people and that their use for commercial purposes can be charged for and he sought to show comparative railway charges for transporting automobiles. But this evidence has no materiality here. If the charge of $15.00 is intended as an equalization of transportation costs between railroads and highways, it rests upon an unsupportable premise.

The unreasonableness of the license charge discriminates against the plaintiff who brings cars into the state for sale in favor of those who deal in used cars obtained from within the state. The charge bears no reasonable relation to the purposes for which it is collected and in practical effect constitutes a protective tariff and is unconstitutionally burdensome. *Interstate Transit Inc.* v. *Lindsey*, 283 U. S. 183; *Young's Market Co.* v. *Board of Equalization*, 12 Fed. Supp. 140 and cited authorities.

The clear statement of principles in *Baldwin* v. *Seelig*, 294 U. S. 511, at 521, 523 inclusive, may be related to the instant case Mr. Justice Cardozo likens the attempt by the New York Legislature to fix milk producers' prices in Vermont on a par with those of New York, as a condition of its sale in New York, to customs duties. He says, "Such a power, if exerted, will set a barrier to traffic between one state and another, as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed by an express prohibition of the constitution, beyond the power of a state, 'Except what may be absolutely necessary for executing its inspection laws.'

Constitution, Article I, Section 10, clause 2: * * * 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business'. *International Textbook Co.* v. *Pigg*, 217 U. S. 91; 112;"

To burden the movement of plaintiff's own property with a substantial tax, when that sum bears no reasonable relation to the express use of and cause of the levy, constitutes nothing less than a customs duty. To declare such tax legal as an exception would, to use the apt words of the Justice above quoted, "be to eat up the rule under the guise of an exception." Other cases of interest by analogy are *Voight* v. *Wright*, 141 U. S. 62; *Brimmer* v. *Rebman*, 138 U. S. 78; *Webber* v. *Virginia*, 103 U. S. 344.

The state cannot exact an arbitrary toll for revenue from any class of highway users. *Interstate Transit Inc.* v. *Lindsey, supra; Sprout* v. *City of South Bend*, 277 U. S. 169.

Judgment will go for plaintiff. A permanent injunction will issue and the bonds given under the temporary restraining order will be exonerated.

Dated May 5th, 1936.

CLIFTON MATHEWS,
Circuit Judge.
ALBERT LEE STEPHENS,
District Judge.
(Not Signed) LEON R. YANKWICH,
District Judge.

(Indorsed:) Filed Jun. 5, 1936. R. S. Zimmerman, Clerk, by Theodore Hocke, Deputy Clerk.

EXHIBIT "C".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

Eq. No. 759-S.

Dissenting Opinion.

HOWARD MORF, Doing Business under the Firm Name and Style of Pacific Wholesale Automobile Company, *Plaintiff*,

vs.

RAY INGELS, as Director of the Motor Vehicle Department of the State of California, *et al., Defendants.*

YANKWICH, *District Judge:*

I dissent.

The main opinion admits that caravaning of automobiles from other states to California has been so extensive as to create a problem. But it denies validity to the California Caravan Act (Statutes of 1935, Chap. 40, California Vehicle Code pp. 174-176) for three reasons: (1) That the classification is arbitrary, in that it does not apply to what is strictly speaking caravaning, i. e., fleet movements of cars on their own wheels, but includes a single car transported from without the state of California, (as the enactment provides) "on its own wheels, or in tow of another motor vehicle for sale." (2) That it is, in reality, a protective tariff against automobiles transported for sale from without the State of California, and thus violative of the commerce clause of the Constitution of the United States (*Constitution of the United States,* Article I, Section 8) and (3) that the amount of the fee charged for each caravaned automobile is excessive and arbitrary and has no relation to the cost of the added burden upon the state traffic, which might justify the regulation, and is thus violative of the due process and equal protection clauses of the Constitution. (*Constitution of the United States,* 14th Amend-

ment, Section 1.) Because of the importance of the mat
ter, I state the reasons for my dissent fully. Of necessity
the questions are inter-related. So to a certain extent th
principles involved must be treated together.

The power of the Congress to regulate commerce be
tween the states is exclusive and plenary, and is not sub
ject to any state restrictions, burdens or limitations
(*Gibbons* v. *Ogden* (1824), 9 Wheat. 1, 70; *University o*
Illinois v. *United States* (1933), 289 U. S. 48.) No stat
may, through the exercise of the taxing or police powers
establish an economic barrier between the states. (*Bald*
win v. *G. A. F. Seelig, Inc.* (1935), 294 U. S. 511; *Bingama*
v. *Golden Eagle Western Lines, Inc.* (1936), 80 L. Ed. pag
600. However, a state may, in the exercise of its reserve
power to regulate intrastate commerce, adopt measure
and regulations which affect interstate commerce *indirectly*
and incidentally only, or the persons engaged in it. I
such regulations do not impede the free flow of commerce
they will be given validity. (See *Boston and Maine Rail*
road Company v. *Armbury* (1932), 285 U. S. 234; *Clyde*
Mallory Lines v. *Alabama* (1935), 80 L. Ed. 191.) So stat
utes which impose a charge for the use of the highways and
facilities of a state by residents of other states or inter
state carriers have been sustained. The limits of the exer
cise of this power have been stated by Mr. Justice Brandei
in *Interstate Transit* v. *Lindsey* (1931), 233 U. S. 183, 185

> "While a state may not lay a tax on the privilege o
> engaging in interstate commerce (Sprout *v.* South
> Bend, 277 U. S. 163, 72 L. Ed. 833, 62 A. L. R. 45, 48 S
> Ct. 502), it may impose even upon motor vehicles en
> gaged exclusively in interstate commerce a charge, a
> compensation for the use of the public highways, whic
> is a fair contribution to the cost of constructing and
> maintaining them and of regulating the traffic thereo
> (Kane *v.* New Jersey, 242 U. S. 160, 168, 169, 61 L. Ed
> 222, 227, 228, 37 S. Ct. 30; Clark *v.* Poor, 274 U. S. 554
> 71 L. Ed. 1199, 47 S. Ct. 702; Sprout *v.* South Bend
> *supra* (277 U. S. 169, 170, 72 L. Ed. 836, 837, 62 A. L. R
> 45, 48 S. Ct. 502). As such a charge is a direct burde
> on interstate commerce, the tax cannot be sustained

unless it appears affirmatively, in some way, that *it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic.* This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use (Interstate Busses Corp. *v.* Blodgett, 276 U. S. 245, 72 L. Ed. 551, 48 S. Ct. 230), or by the express allocation of the proceeds of the tax to highway purposes, as in Clark *v.* Poor, 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702, *supra*, or otherwise. Where it is shown that the tax is so imposed, *it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory.*" (Italics added.)

Some cases intimate that the tax is considered as mere compensation for the damage done to the roads by the driving of automobiles and is based primarily upon the amount of destruction caused by them. (*Kane* v. *New Jersey* (1911), 81 N. J. L. 594, 80 Atl. 453.) Notwithstanding this, courts have left it to the legislatures of the various states to determine the form which the exaction should take. Thus (even in the case of interstate commerce carriers) it may take the form of a fee (*Kane* v. *New Jersey* (1916), 242 U. S. 160) or of a mileage tax, despite the fact that by the law of the particular state carriers of intrastate commerce are taxed upon the basis of gross receipts. (See *Interstate Busses Corporation* v. *Blodgett* (1928), 276 U. S. 245.) Nor does the fact that such a tax imposed directly upon an interstate carrier may be in addition to an annual license fee demanded of all persons using automobiles, make the fee a discriminatory exaction violative of the commerce clause. (See *Clark* v. *Poor* (1927), 274 U. S. 554; *Interstate Busses Corporation* v. *Blodgett*, *supra*; *American Motor Coach System* v. *City of Philadelphia* (1928), (C. C. A. 3) 28 Fed. (2) 736; *Liberty Highway Company* v. *Michigan Public Utilities Commission* (1923), D. C. 294 Fed. 703.) Indicative of the recent trend of the Supreme Court to sustain local impositions or regulations despite their incidental effect upon interstate commerce is *Clyde Mallory Lines* v. *Alabama* (1935), 296 U. S. 261.

Despite the constitutional inhibition against the levying of duties on tonnage by the states of confederation of the United States, Article I, Section 10, Clause 3, the Court there sustained a flat harbor fee of $1.00 for vessels of 300 tons and over entering the harbor of Mobile, saying:

> "And charges levied by state authority, to defray the cost of regulating or of facilities afforded to aid of interstate or foreign commerce have consistently been held to be permissible . . ." (Clyde Mallory Lines v. Alabama, supra, at page 76.)

In the course of control of harbors, the basis and limits of allowable boundary of power . . . (See . . . at page . . .)

> The harbor is a public prospect. . . . Use of them . . . for . . . interstate . . . by the State to secure safety . . . and the preservation of the harbor . . . Morris . . . Duncan, supra, p. 170, Thorpe v. Rutland . . . Cases of them, although engaged exclusively in interstate commerce, may be required to contribute . . . common . . . for . . . the . . . harbor . . . Maryland, 76 U. S. 460, Lange v. Jew for Sale, 94 U. S. 160. Compare Packard v. Banton, 264 U. S. 140, 144.

There is no suggestion that the tax discriminates against interstate commerce. It is not suggested that the tax is so far in excess to obstruct interstate commerce. It is said that all of the tax is used for maintenance . . . of the harbor, that one of it is used for . . . the purpose of the Commission or the administration . . . enforcement of the Act, and one for . . . purposes. This, if true, is immaterial. Since the . . . is collected for a proper purpose and is not . . . amount, the use to which the proceeds . . . is a matter which concerns the plaintiffs." (Italics added.)

being collected as to shock, (as was the case in *Interstate Transit* v. *Lindsey, supra,* and *Prouty* v. *Coyne* (1932 D. C. S. D.), 55 Fed. (2) 289; and see *Young's Market Co.* v. *Board of Equalization* (1935 D. C. Cal.), 12 Fed. Sup. 140) and it was clear to the court that the enactments were, in reality, *revenue statutes aiming to tax the right to carry on interstate business.* But these very cases speak for the validity of a reasonable exaction, without requiring demonstration that the amount is just what is necessary to compensate the state for the use and upkeep of the highways. (See *Gundling* v. *Chicago* (1900), 177 U. S. 183.) As is said in *Interstate Transit* v. *Lindsay, supra,* at page 190:

> "Being free to levy occupation taxes, states may tax the privilege of doing an intrastate bus business without regard to whether the charge imposed *represents merely a fair compensation for the use of their highways.*" (Italics added.)

The services of the state in allowing its highways to be used and in policing them are none the less a service which benefits all (*including the plaintiff*) because, in certain instances, the benefit *may* be greater to other persons than to him. (See *Clyde Mallory Lines* v. *Alabama, supra,* at page 194; *Aero Transit Co.* v. *Georgia Commission* (1933), 295 U. S. 285.) Few cases exist where the exercise of valid power has been nullified by the mere excessiveness of an impost. As said in *A. Magnano Co.* v. *Hamilton* (1934), 292 U. S. 40, at page 47:

> "If the tax imposed had been five cents instead of fifteen cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a contrary conclusion were reached in the present case, it could rest upon nothing more than the single *premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business,* a premise which, standing alone, *this court heretofore has uniformly rejected as fur-*

nishing no juridical ground for striking down a taxing act." (Italics added.)

In dealing with the subject of classification, in the exercise of the police power, it is well to bear in mind that it is impossible to achieve absolute equality. Nor is such equality necessary in order to insure constitutional validity under the due process and equal protection of law clauses of the 14th Amendment to the Constitution. As said by Mr. Justice Holmes, in *Patsone* v. *Pennsylvania* (1914), 232 U. S. 138, in an oft-quoted passage:

> "*A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named.*" (Italics added.)

(See also *Radice* v. *New York* (1924), 264 U. S. 292; *McCary* v. *United States* (1904), 195 U. S. 27; *Rast* v. *Van Denman* (1916), 240 U. S. 343, 357; *Miller* v. *Wilson* (1915), 236 U. S. 373, 383; *Heisler* v. *Thomas Colliery* (1922), 260 U. S. 245; *Quaker City Cab Co.* v. *Pennsylvania* (1928), 277 U. S. 389; *New York ex rel. Bryant* v. *Zimmerman* (1928), 278 U. S. 64; *Fox* v. *Standard Oil Co.* (1934), 294 U. S. 87; *A. Magnano Co.* v. *Hamilton* (1934), 292 U. S. 40; *In re Miller* (1912), 162 Cal. 675; *Miller* v. *Board of Public Works* (1925), 195 Cal. 477; *Graham* v. *Kingswel* (1933), 218 Cal. 658.) These cases show that, in interpreting the exercise of the police or taxing powers, courts have not sought to bind legislative bodies to an abstract or unrealizable ideal of equality. They have insisted merely that there be a reasonable foundation for the classification. When satisfied of its existence, they have sustained it. (See *St. Louis R. R. Co.* v. *Paul* (1899), 174 U. S. 404; *Petit* v. *Minnesota* (1900), 177 U. S. 164, 168; *Williams* v. *Fears* (1900), 179 U. S. 270, 275; *Knoxville Iron Co.* v. *Harrison* (1901), 185 U. S. 14; *Boxley* v. *McLaughlin* (1915), 236 U. S. 385; *Gregg*

Dyeing Co. v. Query (1932), 286 U. S. 472; *Hicklin* v. *Coney* (1933), 290 U. S. 169; *Nebbia* v. *New York* (1935), 291 U. S. 502; *Bordens Farm Products* v. *Ten Eyck* (1936), 80 L. Ed. 469.) A study of these and other cases warrants the following conclusion: If a legislature may, for regulatory purposes, distinguish between barber shop employment and other kinds of labor (*Petit* v. *Minnesota, supra*), or between "immigrant agents" engaged in hiring laborers to be employed beyond the limits of a State and persons engaged in the business of hiring for labor within the State (*Williams* v. *Fears, supra*), or exclude chambermaids in rooming and lodging houses or women performers in certain places from the provisions of laws regulating the hours of labor of women (*Miller* v. *Wilson, supra; In re Miller, supra; Radice* v. *New York, supra*), or regulate the hours of labor of pharmacists and student nurses and exclude graduate nurses (*Bosley* v. *McLaughlin, supra*) or the manner of payment of wages of employes in certain industries only (*St. Louis R. R. Co.* v. *Paul, supra*), if a product, like oleomargarine, may be selected for special taxation so as to discourage its use, in favor of butter (*A. Magnano Co.* v. *Hamilton, supra*) if a legislature may require disclosure of the by-laws and membership of one group of oath-requiring association (*like the Ku-Klux Klan*), and not require it of others (*like labor unions, or other fraternal organizations*) (*New York ex rel. Bryant* v. *Zimmerman, supra*), if an automobile licensing and tax scheme may exclude automobiles of farmers or others from the exaction (*Aero Transit Company* v. *Georgia Commission* (1935), 295 U. S. 285; *Hicklin* v. *Coney, supra*), if, in the enforcement of an industrial regulatory measure, an administrative body may apply different rules as to price as between well-advertised dealers and independents, giving a differential to one group and not to the other (*Borden's Farm Products* v. *Ten Eyck, supra*), a classification which, so far as known includes the whole class, should not be stricken down, merely because of the possibility that it might result in inequality in some individual case. There is no evidence in the record that there is any caravaning within the state. And while it is true that, occasionally, a car may be moved on its own

wheels for the purpose of sale within the state, this fact does not militate against the validity of the classification. Such car, of necessity, would have a California registration and would be moved by employes of the owner or of the buyer and would present none of the dangers of out-of-state transportation. So we have a reasonable factual basis for the classification. (See *Piper* v. *Bingaman* (1935) (D. C. N. Mex.), 12 Fed. Sup. 755.)

> "Of course, the mere fact of classification is not enough to put a statute beyond the reach of the equality provision of the Fourteenth Amendment. Such classification must not be 'purely arbitrary, oppressive or capricious.' American Sugar Refining Co. *v.* Louisiana, 179 U. S. 89, 92. *But the mere production of inequality is not enough. Every selection of persons for regulation so results, in some degree. The inequality produced, in order to encounter the challenge of the Constitution must be 'actually and palpably unreasonable and arbitrary.'* Arkansas Natural Gas Co. *v.* Railroad Commission, 261 U. S. 379, 384, and cases cited." (*Radice* v. *New York, supra*, at page 296).

In assaying the classification under discussion, it is well to advert to some of the facts testified to at the hearing which were also before the legislators during the deliberations on the bill. The practice has grown up in the last few years of moving automobiles on their own wheels over the public highways of California to their place of sale. The movement is accomplished by fleets of cars of from eight to thirty or more cars, most of them joined in tandem with two cars driven by one driver. California is a large state with great distances. The caravaning of automobiles has increased traffic hazards, and resulted in many law violations and abuses. The abuses were found to exist only among persons who moved cars on their own wheels from without the state for the purpose of sale. To particularize the conditions and some of the abuses: The automobiles are moved in fleets by the tandem-towing method. Usually, there is no tail light on the towed car. The con-

trol of the two cars comes from the brakes of the first car. So the towed car may swing or skid or fail to follow the towed car on curves. The driver of the towing car has no clear back vision. The movement in fleets makes it difficult to pass caravans moving on the highway. When, as one officer testified, there is trouble and the caravan is halted, a traffic hazard arises. Many stolen and cars with fraudulent registrations are brought in in this manner. The type of drivers employed complicates the problem. They are usually persons without any permanent residence or visible means of support, driving the car not as an occupation, but merely for the purpose of obtaining transportation to California. They do not know the traffic laws of California. Conformance means nothing to them because once the state is reached, their objective has been attained, the El Dorado has been reached. Because these persons have no opermanent residence, giving them a summons to appear means nothing. In many instances, as the testimony showed, the persons cannot, later, be found. The only other alternative, that of arresting them for violation, makes confusion worse confounded. The officer must leave his place on the highway and take the offender before a magistrate. They drive long hours. Many of them have no places to sleep other than in the cars. They become fatigued and careless. All these facts are very important factors in the happening of accidents. Many of the cars so moved have foreign license plates. Without the Caravan Act, they could move over the highways of the state without registration and without identification. These facts present a serious evil with which the California Legislature sought to deal. The evil was of recent origin. There were no legislative precedents for any other method of combating it. The Legislature sought to remedy it by making a charge for the use of its highways for commercial purposes by persons caravaning automobiles. It defined caravaning as "the transportation from without the State of *any motor vehicle* operated on its own wheels or in tow of another motor vehicle, for the purpose of selling or offering the same for sale to or by any agent, dealer, manufacturers' representative, purchaser, or prospective pur-

chaser who may be located within or without this state". (Section 1, Statutes of 1935, Chapter 402, California Vehicle Code (1935), pages 174-175.) Had the Legislature sought to exclude single cars operated on their own wheels or units of one towed car, and confined the enactment to fleets of cars, such a classification might have been more difficult to defend than the present one. This because it might have been shown that all these cars originating out of the state caused the same difficulties, irrespective of the size of the caravan. So the Legislature included *the whole class* which experience had shown brought on the particular evil.

Ours is the duty to stay arbitrary power in legislative action. This duty, however, we must perform in the light of the doctrine laid down by Mr. Justice Roberts in *Bordens' Farm Products* v. *Ten Eyck, supra,* at page 473:

> *Judicial inquiry does not concern itself with the accuracy of legislative finding, but only with the question whether it so lacks any reasonable basis as to be arbitrary."* (Italics added.)

In dealing with the exercise of the police power, fairly debatable questions as to "its reasonableness, wisdom and propriety are not for the determination of courts". (*Standard Oil Company* v. *Marysville* (1929), 279 U. S. 582, at 584.) Granted that the operation of the enactment may work to the advantage of the dealers in second hand automobiles who purchase automobiles within the State, it is not a constitutional objection to the exercise of the police power of a State that it may foster the development of one form of business and restrict another. (*Fox* v. *Standard Oil Co.* (1934), 294 U. S. 871; *Sproles* v. *Binford* (1932), 286 U. S. 374; *Aero Interstate Co.* v. *Georgia Commission, supra; Hicklin* v. *Coney, supra.*)

To my way of thinking, the Act contains no discrimination between interstate and intrastate commerce. Nor between persons engaged in the same business and operating the same or similar types of vehicles. The Act aims to cover only one group shown to exist—a group residing within the State, endeavoring to use the highways of the State for the purpose of caravaning vehicles originating

out of the State for sale. There is no evidence to show there are any caravans originating within the State operating either between various points within the State or going out of the State. The only Caravaning within the State testified to at the trial was caravaning of automobiles originating outside of the State, in their course, between various points within the State, to their destination. The fee charged is a flat fee and its size is not such as to warrant the conclusion that it is unreasonable. I am thus unable to see in the enactment the violation of either the commerce or the due process or equal protection clauses of the United States Constitution.

Hence my dissent from my brethren.

Dated this 5th day of May, 1936.

LEON R. YANKWICH,
U. S. District Judge.

(Indorsed:) Filed May 5, 1936. R. S. Zimmerman, Clerk, by Louis J. Somers, Deputy Clerk.

(8292-C)

No. [illegible]

[illegible], as Director of the Motor Vehicle Department of the State of California; HOWARD B. DEEMS, as Assistant Director of said Motor Vehicle Department of the State of California; JOHN C. CORBETT, [illegible] STEWART, R. E. COLLINS, RAY [illegible] and RAY L. RILEY, as members of the State Board of Equalization and constituting said board in the State of California; and H. [illegible] MOUN,

Appellants,

vs.

HOWARD MORP, doing business under the first name and style of PACIFIC WHOLESALE AUTOMOBILE COMPANY; UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation; and CONTINENTAL CASUALTY COMPANY, a corporation,

Appellees.

BRIEF OF APPELLANTS

With Argument

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Attorney General of California

FRANK [illegible]
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Deputies Attorney General

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ARGUMENT

I

Chapter 402, Statutes of 1935 of California, does not discriminate against or burden interstate commerce, or deny equal protection of the laws 27

A. The limitation of Chapter 402 to the movement of vehicles from without the state does not cause any discrimination or burden interstate commerce, because the included class comprises all those and only those who move motor vehicles in caravans or fleets on the California highways. The definition of the class aptly describes those whose practices created the necessity for the legislation, and is the only practical and workable definition; on this see also "B, 2, (1)" below 29

B. That Chapter 402 is not in terms limited to the movement of fleets or caravans, but includes single cars, does not result in any discrimination against or burden upon interstate commerce, or deny equal protection of the laws, because:

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1. There is no appreciable movement of single cars from without the state ---------- 45

2. Even though the movement of cars from without the state should include a considerable number of single cars, this would not invalidate the classification, because:

(1) The inclusion of single cars in the class is necessary to make a workable statute and is a permissible margin to insure enforcement -- 49

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II

The permit fee of $15 per car required by Chapter 402 is not excessive or unreasonable; it is a charge for the privilege of using the highways and is a police power regulatory fee, and its exaction does not violate the Fourteenth Amendment or the Commerce Clause ------- 61

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C. The permit fee is a charge for the privilege of using the highways and is a police power regulatory fee and is not excessive in amount as to either separately or as both ---------- 75

III

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1936

No. 456

RAY INGELS, as Director of the Motor Vehicle Department of the State of California; HOWARD E. DEEMS, as Registrar of the Motor Vehicle Department of the State of California; JOHN C. CORBETT, FRED E. STEWART, R. E. COLLINS, RAY EDGAR and RAY L. RILEY, as members of the State Board of Equalization and constituting said board in the State of California; and E. SEYMOUR,

Appellants,

vs.

HOWARD MORF, doing business under the firm name and style of PACIFIC WHOLESALE AUTOMOBILE COMPANY; UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation; and CONTINENTAL CASUALTY COMPANY, a corporation,

Appellees.

BRIEF OF APPELLANTS

With Appendix

Appeal from the District Court of the United States for the Southern District of California, Central Division.

OPINION BELOW

The opinion of the district court is reported in 14 Federal Supplement 922 (R. 76). The dissenting opinion appears at page 928 (R. 85).

STATEMENT OF THE CASE

This is an appeal from the final decree of a district court of three judges (Judicial Code, section 238, par. (3), and section 266; U. S. C., Title 28, section 345, par. 3, and section 380), which enjoined appellants, defendants below, officers of the State of California, from enforcing against appellee Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company, plaintiff below, the provisions of Chapter 402 (page 1453), Statutes of 1935 of California (Appendix A, page 86) as unconstitutional.

Appellee's bill of complaint asked temporary restraining order, interlocutory injunction and permanent injunction against the enforcement of the statute. Upon the filing of the bill, temporary restraining order issued, and order issued requiring appellants to show cause why interlocutory injunction should not be granted (R. 12). Appellants filed return to said order to show cause and answer (R. 14). The cause came for hearing before the court of three judges upon said show cause order and evidence was introduced by appellants and appellee Howard Morf. It was stipulated the court could enter final decree without further hearing.

On May 5, 1936, the court, one judge dissenting, filed its opinion (R. 76), holding the act in conflict with the commerce clause, equal protection of the laws and due process clauses of the federal constitution. The dissenting judge filed an opinion that the act is valid (R. 85). Thereafter the court filed its findings of fact and conclusions of law (R. 33). Appellants filed exceptions to such findings and conclusions (R. 23). On June 8, 1936, the court entered the final decree appealed from (R. 44). The district court allowed this appeal August 14, 1936 (R. 73).

While the temporary restraining order was in effect, appellee Howard Morf filed bonds, as required by such order, with appellees United States Fidelity and Guaranty Company and Continental Casualty Company as sureties. The final decree exonerated the sureties and they were made parties to this appeal (R. 73). For brevity and convenience the term appellee as used hereafter means the plaintiff below unless otherwise stated.

The Issues

The act which is attacked by appellee, Chapter 402 (page 1453), Statutes of 1935 of California (Appendix A), became effective September 15, 1935. It is commonly referred to as the "Caravan Act." It defines, in section 1, "caravaning" as

> "The term 'caravaning' as used in this act shall mean the transportation from without the state of any motor vehicle operated on its own wheels or in tow of another motor vehicle, for

the purpose of selling or offering the same for sale to or by any agent, dealer, manufacturer's representative, purchaser or prospective purchaser, whether such agent, dealer, manufacturer's representative, purchaser or prospective purchaser may be located within or without this state. * * *"

It is provided in section 2:

"No person, firm or corporation shall use any highway in this state for caravaning motor vehicles unless and until there shall first have been secured from the Motor Vehicle Department of the State of California a special permit as to each vehicle so caravaned, for the use of the highways of this state in caravaning such vehicle, * * *."

Section 3 requires:

"a fee of fifteen dollars for each motor vehicle for which a caravan permit may be issued, whether such vehicle be operated under its own power or in tow of another vehicle * * *."

Section 4 provides in part:

"No permit issued under this act for caravaning motor vehicles or vehicles shall be transferable either as between persons or as to the vehicle for which it is issued, and shall only be valid for the trip or trips to be specified in said permit, and in no event shall such permit be valid for a period of more than ninety days after it shall have been issued. * * *"

Section 5 provides in part:

"The fee paid for any caravaning permit issued under this act shall be in lieu of all

other registration fees and license fees for the use of public highways in this State, by motor vehicle during the period that such motor vehicle may be operated under and in accordance with such permit upon the public highways in this State; * * *."

Section 6 is in part:

"All fees from the issuance of permits collected by the Motor Vehicle Department under this act shall be paid into the general fund in the State treasury."

It is also provided that when three or more vehicles or groups of vehicles are operated they must be spaced at least 150 feet apart (Sec. 2); that parties engaged in caravaning vehicles must comply with the laws relating to transportation for hire by motor vehicle except that no other license fee is required but the $15 permit fee fixed by section 5 (Secs. 1, 3, 5); and penalties for violation are fixed (Sec. 7).

Appellee is now and ever since 1928 or 1929 has been engaged at Los Angeles in the wholesale used car business. He buys used cars in states other than California and has them driven to his place of business in Los Angeles where he sells them to retail dealers. Obviously his operations are within Chapter 402. He claims in his bill of complaint that the act violates the "Commerce Clause" of section 8 of Article 1 of the constitution, and the "Due Process of Law" and "Equal Protection of

the Laws" clauses of the Fourteenth Amendment (R. 7).

Appellants' return and answer denies the allegations of unconstitutionality and alleges facts to support the classification: that the persons classified by the act conduct a form of motor vehicle traffic so different from other forms of highway traffic as to justify separate classification; that they customarily and ordinarily move motor vehicles in long processions or caravans, many of the cars being joined in two-car units with one car towing another; that this manner of operations causes unusual and hazardous traffic conditions and law violations and is a special commercial use of the public highways.

District Court's Findings of Fact

The district court entered findings of fact and conclusions of law (R. 33), to which appellants excepted (R. 23). A reading of such findings will show that the so-called findings of fact are largely argumentative propositions of law. As to the actual findings of fact, we submit that every finding of fact on a controversial issue is contrary to the plain and undisputed evidence.

We shall show this to be so in detail as we review the record. At this point, however, we summarize the findings of fact and indicate briefly wherein they are contradicted by the evidence.

Of the affirmatively stated findings of fact, the 4th, 6th, 7th, 20th, 23d, 27th except last two sen-

tences, 31st, and 32d, are argumentative propositions of law; and the same is true of negatively stated findings of fact 1 and 5.

The 1st, 2d, 3d, 5th, 10th, 12th, 13th, 18th, 28th, 29th and 30th affirmatively stated findings of fact, while somewhat mixed as to findings of fact and conclusions of law, are not disputed.

Affirmatively stated findings of fact 8, 9, and the last two sentences of 27, and negatively stated findings 3, 4, 6, 7, and 8, can be summarized as follows:

No unusual police problem is created by the driving of a single vehicle into the state on its own wheels for purpose of sale. Not all cars brought in on their own wheels for purpose of sale are in fleets or towed in tandem; more than fifty per cent are in fleet. A fleet of more than four automobiles creates certain traffic difficulties but these are the exception rather than the rule and are not serious. The tandem-towing method creates no special hazards. The drivers and the driving of cars brought into the state for purpose of sale cause substantially no more problem than other drivers. Stolen or fraudulently registered cars are not present among such cars any more than among all cars in the state.

As to such findings, however, the evidence is that substantially all of the vehicles brought into the state on their own wheels for purpose of sale are in fleets or caravans of 8 to 50 cars. (R. 47, 51, 56, 60, 62, 63) The evidence specifically shows that a caravan of four or more cars is a definite highway

hazard (R. 55, 56), that law violation and unusual hazard is the rule in the operation of caravans and that a caravan as to which the contrary is true is an unusual and glowing exception (R. 49).

Affirmatively stated findings of fact 11, 14, 18, 19, 24, and 25, and negatively stated finding 2, can be summarized as follows:

Appellee's business, is chiefly wholesale automobile dealer. The purchasing of automobiles and the driving them over the highways to his place of business in Los Angeles is necessary to the continuance of his business. He buys automobiles and has them driven to California singly, by twos coupled, and in fleets of several, and while so operated they are directly under his supervision. He brings into the state approximately between 20 and 25 per cent of all the cars brought into the state on their own wheels for purpose of sale. Between 30 and 40 per cent of the cars he brings in come in singly and not in company with other cars. Although he has operated in this manner for several years he has caused no traffic trouble. His business is large and lucrative, but he operates upon a small margin of profit, and the $15 permit fee would absorb his net profit and ruin his business and a large part of the used car business in California.

Contrary to such findings, however, it is plain, even from these findings, that a principal element in appellee's business is transporting used automobiles to California; appellee's bill of complaint

so shows (R. 4, 6), and so does the evidence. An analysis of appellee's own testimony will show that he brings all of his cars in by fleets averaging 12 cars each and not singly (R. 60, 62, 63). His fleets have caused traffic trouble (R. 47). Used cars are not obtainable for the trade in California and must come from outside the state, hence the $15.00 permit fee would necessarily be passed to and absorbed by the purchasers, and its payment would not destroy appellee's business (R. 63).

Affirmative finding of fact 21 is that the amount of the permit fee is arbitrarily fixed and unreasonable in amount.

There is no evidence in the record to warrant such a finding. The fee is exacted as a charge for the privilege of using the highways and as a police power regulatory fee, and there is nothing to show that it is excessive as either one or both.

Affirmative findings of fact 22 and 26 state that there is "considerable" transportation wholly within the State of California in intrastate commerce of automobiles on their own wheels singly, in twos coupled, and in fleets of several, for the purpose of sale, and that the fee exacted by Chapter 402 discriminates against appellee in favor of such intrastate commerce.

The uncontradicted evidence is that there is no traffic intrastate in California of automobiles on their own wheels for purpose of sale in twos coupled or in fleets, and that there is only an inappreciable or small amount of single car movement

for purpose of sale. Furthermore, there is a very strong inference in the evidence that such limited single car movement for purpose of sale as exists intrastate is confined to cars brought in from without the state and is a succeeding movement of such cars after they have first come to rest in the state (R. 58, 54).

The Evidence

There is substantially no conflict in the evidence. It shows that the movement of motor vehicles on their own wheels from without the state for purpose of sale is conducted in caravans which range from 8 to 50 cars, many of which are joined in tandem with the lead car towing the other, resulting in unusual traffic hazards and difficulties not present in other forms of motor vehicle traffic (R. 47, 56, 57, 52–55).

The condition and caliber of the drivers are such that their driving in itself creates many traffic difficulties. Many of them are casually obtained, by radio or other advertising, for the one trip only. They are fatigued by long driving and are mostly nonresidents unacquainted with and chronically unobservant of local traffic laws. (R. 57, 54.)

The evidence further shows that there is no similar or comparable traffic from point to point within the state in intrastate commerce or from within to without the state; that the intrastate movement of cars on their own wheels for purpose of sale is comparatively limited and "what little there is of it" is the

movement of single cars not in caravans and not in two-car hook-ups and that such cars are driven by regular employees of California dealers (R. 57, 54, 55).

During the year 1934 there were 9663 automobiles moved into California on their own wheels for purpose of sale. From January 1, 1935, to November 29, 1935 (the date of the trial), 14,000 automobiles were so brought into the state (R. 58). Appellee himself during this 11 months of 1935 caravaned approximately 3000 used cars into the state, which he thereafter sold to retail used car dealers. During this same period he purchased only fifty used cars in California. The reason for the bringing of used cars into the state is that dealers can not get used cars in any other way (R. 63).

In the years 1931 and 1932 particularly, caravaning of motor vehicles into the state of California was observed and complained of as a hazard on the highways (R. 52). Previous to 1933 nothing was done about regulating caravaning. In 1933 the California Highway Patrol began to assign men to regulate it and began to regulate it to some extent, such as ordering the drivers to keep a certain distance from one another (R. 56). In the opinion of Chief Cato of the California Highway Patrol, "It was definite last winter (1934–35) that we must do something about caravaning. * * * We found great fleets of cars coming through and at this time there was no caravan law requiring them to travel fifty feet

apart and wrecks were reported. We had numerous complaints from citizens being crowded off the highways." (R. 56, 52.) "There is a serious condition on the road because of caravans, so far as safety is concerned." (R. 55.) The witness, Martland, testified that caravans constitute a very definite traffic hazard, particularly over the Sierra Nevada Mountains. (R. 57.)

Between January 1, 1935, and July 6, 1935 (the date Chapter 402 was enacted; it became effective September 15, 1935), six additional highway patrolmen were employed because there were caravans on the road. This was necessitated by the conditions caused by caravaning prior to the time the Caravan Act was enacted. If the caravaning business were entirely eliminated, these men could be dispensed with (R. 53). Since July 6, 1935, additional men have been appointed to the Highway Patrol, some whose duties are entirely the regulation of caravaning and some to regulate traffic which has been increased by caravaning. The Chief of the Highway Patrol anticipates putting on more men for these purposes (R. 54). The salary of a highway patrolman commences at $170 per month and increases to $225 (R. 59).

There are from eight to fifty cars in a caravan. (R. 47, 51, 56). The average number of cars in appellee's caravans is twelve (R. 62). A caravan composed of more than four cars is a traffic hazard (R. 55, 56). Caravans run train-like; they will not

permit traffic going in the same direction to pass and cause a hazard to those coming from the opposite direction who attempt to pass them (R. 55). A traffic officer testified that he had to stop most of the caravans because the cars are too close together, and then send them on spaced at a safe distance so that other cars could pass without causing wrecks. On one occasion since the Caravan Law became effective, he found a caravan of thirty-four of appellee's cars in which eight of the cars were traveling thirty-five feet apart (R. 47, 48). The drivers of caravan cars do not drive at approximately the maximum speed as do resident drivers. They are unfamiliar with and do not observe the California rules of the road (R. 54).

Many of the cars are towed by other cars. Sixty to seventy per cent of the cars appellee brings into the state are brought in with one car towing another (R. 60). Each caravan is accompanied by a supervisor and a "trouble shooter", each of whom drive a single car (R. 62). When one car tows another they are in some cases tied bumper to bumper. This causes the car in front to make a wide turn. Another way of fastening the cars together is by a tow-bar which is fastened to the rear of one car and the front of the other (R. 48, 61). Highway Patrolman Walsh testified that about forty per cent of the caravan cars he has had to stop has been on account of the towed car whipping and swaying from one side to the other and on many occasions crossing the center line of

the highway. In such cases he stops the cars and makes the operators tear down the tow-bar connection and does not let them start again until they have passed inspection. Some of the tow cars have safety chains and others do not (R. 48). If the two-car hookup is driven fast, in swinging about it creates an additional hazard on the road (R. 48, 54). Caravans pass other vehicles without sufficient clearance between vehicles approaching. They drive in the center of the highways (R. 47, 51, 52, 53).

The lights on cars in caravans are never up to what they should be (R. 47, 51). The tail lights on the towed car are not lighted. Many times caravans must be stopped to make the drivers turn on the rear lights of the towed car (R. 49).

When it is necessary to stop a caravan to require a correction of these conditions, this often results in a complete tie-up of traffic. When the first car stops the rest of the cars go to the right and left on the wrong side of the road in front of oncoming traffic, blocking the highway (R. 47, 48). A specific instance of this was observed in one of appellee's caravans which was stopped because of defective lights and cars traveling too closely together (R. 47, 48).

Issuing citations to caravan drivers, without arresting them, is useless as they do not appear in court because they are nonresidents and have no regular address. Some caravan car drivers have been arrested (R. 48, 51). This requires the highway patrolman to leave his beat.

Some caravans carry passengers. There may be

four or five cars with five people, three in the back seat and one beside the driver. The passengers include women, and children too small to walk (R. 48, 49). Sometimes the driver of a two-car hook-up is so crowded with passengers as to make his driving unsafe (R. 56).

The drivers of caravan cars are mostly nonresidents of the state. The general caliber of the drivers is poor because they are transients picked up from newspaper ads in Detroit, South Bend and other places. The condition of the drivers is generally one of considerable fatigue by the time they reach California because of working long hours (R. 47, 54, 57).

Necessary inspection and regulation of caravans require a large amount of the time of highway patrolmen. On one occasion fifty-seven minutes were spent in one spot on a Saturday night with one of appellee's caravans. After that the patrolman had to take an hour and ten minutes to follow that caravan beyond his congested area to keep the road clear for oncoming traffic, following the caravan twenty to thirty miles (R. 47-51).

All of these conditions are typical of the movement of caravans on the highways. A highway patrolman who testified to all these typical conditions has seen one caravan which was an exception, a caravan of new cars coming from South Bend to San Diego. The cars followed at a safe distance, kept on the right side of the road, had tow-bars with the safety chain, good lights, and good, experienced drivers (R. 49).

In a check made before Chapter 402 was enacted, it was discovered that cars that had been caravaned

across the country were being sold to purchasers as new cars; four or five dealers had altered the bills of sale in 212 cases so that the purchasers had no way of knowing that the cars had been so used (R. 57, 59). This practice is now greatly eliminated by Chapter 402. The border man or traffic officer determines whether it is a caravan car, and a record is kept of every car caravaned into California. This also eliminates to a great degree the bringing into the state of stolen cars. Except for Chapter 402 a car could be driven into the state, its plates destroyed and registration secured as a new car. (R. 59.)

There is no caravaning of cars from within the state to without the state. The movement of cars within the state from place to place for purpose of sale is small, a comparatively limited movement. In the movement from one point to another in the state they do not run the cars together like the caravaning of cars from without the state to within the state. Cars that are moving to more favorable markets, such as from Los Angeles to San Francisco, what little movement there is, are driven singly and usually by employees of the dealers (R. 54, 58).

The administration expense of issuing caravan permits is about $5 for each permit. An increase in clerical help to administer the act is required in the Department of Motor Vehicles, in the border stations, at Sacramento, and in the branch offices (R. 58-59).

Three of the witnesses who testified to the foregoing at the trial also gave the same testimony before the committee of the legislature at a committee hearing on the caravan law before its enactment (R. 55, 56, 59).

Appellee sells the cars he brings in to retail dealers. About 125 to 200 per month, about half the number brought in, are sold outside Los Angeles to dealers in other California cities and at points outside the state such as Seattle and Portland. The dealers come to Los Angeles, buy the cars, and drive them away. Appellee has taken cars to San Francisco which were sold there after arrival. His average net profit on each automobile ranges from $10 to $15, and the money made depends upon the volume of business. He uses two systems in connecting towed cars, one being by tow-bar and the other by safety chains. He has driven a car towing another and has had no difficulty in doing so and has not noticed any particular hazard about it. In his opinion it is possible to drive such a two-car combination in a careful and prudent manner. He does no radio or newspaper advertising for drivers. Part of the drivers are in his employ, some having been so employed for a long time, and a very small percentage are people desiring to come to the coast and who drive for their transportation and possibly meals and gas or oil or other consideration depending on the agreement. There are dealers who make it their business to bring cars through for a flat fee of $7.50 to $15, as agreed

upon. The actual buyer comes through with the caravan, and he handles the funds for the company and hires the drivers, some of whom are his regular drivers. A "trouble shooter" accompanies any caravan of over four or five cars. In caravans the average number of cars is twelve. One driver is assigned to every two cars and the manager and "trouble shooter" each drive single cars. Occasionally relief drivers are carried. He has eight buyers, located through the southern states, who purchase the cars. He has been bringing automobiles into California in this manner for three years, and none of his cars have been in accidents and none of his drivers have been arrested. He has actually caravaned cars into the state and has observed, caravaning into the state, and has observed nothing that causes him to believe there is any hazard in the mere driving of such cars (R. 60-63).

SPECIFICATIONS OF ERRORS

The district court erred in entering its final decree permanently enjoining the defendants (appellants) from enforcing against plaintiff (appellee) the provisions of Chapter 402, Statutes of 1935 of California, and exonerating the bonds given by plaintiff (appellee) under the temporary restraining orders herein; and erred in making and entering its findings of fact and conclusions of law; in the following respects:

1

The district court erred in holding Chapter 402, Statutes of 1935 of California, to be in violation of the Commerce Clause of section 8 of Article One of the Constitution of the United States, because Chapter 402 does not discriminate against, nor impose an unconstitutional burden upon interstate commerce, nor otherwise conflict with the Commerce Clause.

2

The district court erred in holding Chapter 402, Statutes of 1935 of California, to be in violation of the "equal protection of the laws" clause of Section One of the Fourteenth Amendment to the Constitution of the United States, because Chapter 402 does not unconstitutionally discriminate against plaintiff or any other person or deny to plaintiff the equal protection of the laws.

3

The district court erred in holding Chapter 402, Statutes of 1935 of California, to be in violation of the "due process of law" clause of section 1 of the Fourteenth Amendment to the Constitution of the United States, because Chapter 402 does not impose unreasonable requirements upon plaintiff and does not deprive him of property without due process of law.

4

The court erred because on the entire record the plaintiff has failed to sustain the burden of overcoming the presumption of the correctness of the judgment of the legislature that a valid need of legislation existed and that the class defined in Chapter 402 includes the entire class properly the subject of such legislation, and has failed to overcome the presumption that Chapter 402 is reasonable and nondiscriminatory.

5

The court erred in making affirmatively stated findings of fact (22) and (26) to the effect that Chapter 402 discriminates against plaintiff in his operations in interstate commerce in favor of intrastate commerce, because the evidence on the entire record is insufficient to overcome the presumption of the propriety and nondiscriminatory character of the classification made by such act, and because the evidence shows that the class defined in said act is a distinct class constitutionally subject to separate classification, and that there is no other motor vehicle traffic in California in either intrastate or interstate commerce similar or comparable to that conducted by the included class.

6

The court erred in making affirmatively stated findings of fact (8), the last sentence of (9), and

(27), and negatively stated findings of fact (4), (6), (7), and (8), to the effect that there are no unusual or serious safety, traffic or police problems created by the movement of vehicles on their own wheels into California for purpose of sale, because the evidence on the entire record is insufficient to overcome the presumption of the correctness of the judgment of the legislature that such problems existed and merited the enactment of Chapter 402, and because the evidence shows that the class defined in Chapter 402 conducts a specialized form of highway traffic, substantially distinct from other traffic, which creates substantial safety, traffic and police problems differing from those of other traffic.

7

The court erred in making affirmatively stated findings of fact (11) and (19) to the effect that plaintiff's sole occupation is that of dealer in automobiles, and in making negatively stated finding of fact (2) that plaintiff's use of the highways is not an extraordinary use or for direct gain or profit or as a place of business, because the allegations of plaintiff's bill of complaint and the evidence show that the principal element of plaintiff's occupation is that of transporting automobiles upon the highways on their own wheels to market for commercial gain.

8

The court erred in making affirmatively stated finding of fact (20) and negatively stated finding

of fact (1), to the effect that Chapter 402 does not exact a charge for the use of the public highways, because the same are not findings of fact but are conclusions as to the interpretation of the terms of the statute not aided by or based on any evidence; and because such act by its terms shows, and the evidence shows, that the permit fee it requires is exacted, at least in part, as a charge for the use of the public highways for commercial gain.

9

The court erred in making affirmatively stated findings of fact (21) and (22) to the effect that the permit fee required by Chapter 402 is arbitrarily fixed and unreasonable in amount, because such fee is a police power license fee and is a tax for a commercial use of the highways, and the evidence does not show that the amount of the fee is excessive either as a police power license fee, or as a tax for the use of the highways, or as both.

10

The court erred in making affirmatively stated findings of fact (19), (25) and (27) and negatively stated finding of fact (3) to the effect that plaintiff brings cars in singly and not in groups, because the evidence is insufficient to show that plaintiff does so, but does show that the regular and prevailing practice of those within the class defined in Chapter 402 is to move vehicles in fleets and that plaintiff regularly follows the prevailing practice.

11

The court erred in making affirmatively stated findings of fact (15), (16), (17), and (7), to the effect that plaintiff attempted to move three particularly described vehicles into California, one singly and two joined, but not in groups with other vehicles, and that plaintiff's specific complaint in this case is the demand by defendants that plaintiff pay upon such specific vehicles the permit fee required by Chapter 402, because plaintiff's bill of complaint does not allege a practice of moving vehicles singly and not in fleets and does not predicate any special claims of unconstitutionality on the ground that the act applies to singly moved vehicles, but said bill alleges generally that Chapter 402 is entirely invalid and asks that the entire enforcement thereof be enjoined, and does not seek relief with respect to singly moved vehicles or any particular vehicles; and because plaintiff's bill does not claim and the evidence does not show that the vehicles particularly described in said bill were driven singly and not as part of a fleet; and because there is no evidence of the moving by the plaintiff of the vehicles or of any particular vehicle.

12

The court erred in making affirmatively stated findings of fact (19) and (14), to the effect that to require plaintiff to pay the fifteen dollars permit fee for each automobile would absorb his profit and ruin his business and a large part of the used car

business in California, because there is no evidence to support such finding and because the evidence affirmatively shows the condition of the used car market in California to be such that the purchasers would absorb such permit fee cost.

13

The court erred in making affirmatively stated findings of fact (7), (23), (27), and (31) in so far as the same attempt to construe Chapter 402 because, the same are not findings of fact but are argumentative conclusions as to the construction of Chapter 402 based solely upon the terms of the act and not upon evidence; and because the evidence sustains the judgment of the legislature as to the necessity of the legislation and the propriety of the classification.

14

The court erred in making affirmatively stated findings of fact (4) and (6) and negatively stated finding of fact (5), because the same are not findings of fact, but are argumentative legal propositions and are incorrect as such.

SUMMARY OF ARGUMENT

I

A. The limitation of Chapter 402, Statutes of 1935 of California, to the movement of motor vehicles from without the state, does not violate the Commerce Clause or deny equal protection of the

laws, because the class included in the act comprises all those, and only those, who move motor vehicles on the California highways in caravans or fleets. The definition of the class aptly describes those whose practices created the necessity for the legislation, and is the only practical and workable definition; on this see also "B, 2, (1)" below. (Assignments of Error 1, 2, 4, 5, 6, 10, and 11.)

B. That Chapter 402 is not in terms limited to the movement of motor vehicles in caravans or fleets, but includes single cars, does not result in any discrimination against, or burden upon, interstate commerce, or deny equal protection of the laws, for the following reasons: 1. There is no appreciable movement of single cars from without the state. 2. Even though the movement of cars from without the state should include a considerable number of single cars this would not invalidate the classification because: (1) The inclusion of single cars is necessary to make a workable statute and is a permissible margin to insure effective enforcement, and (2) single cars moved alone from without the state are subject to separate classification (Assignments of Error 1, 2, 4, 5. 6, 10 and 11).

II

The permit fee of $15 per car required by Chapter 402 is not excessive or unreasonable; it is a charge for the privilege of using the highways and for the cost of traffic regulation.

A. The fact that the act places the permit fees collected in the state general fund is immaterial. (Assignments of Error 1, 7, 8, 9, 12, 2, 3.)

B. The last sentence of section 6 of Chapter 402, stating that the fees are to reimburse the state for the expense of policing the highways does not prevent the act from being an act imposing a charge for the privilege of using the highways. This sentence has no effect upon the working of the act or the disposition of the fees collected, and can not control the construction of the act, because:

1. This court must ascertain the true nature of the fee by ascertaining the operation and effect of the act. 2. A statute susceptible of two constructions should be given the construction favoring its constitutionality. 3. If this sentence should require a construction making the act unconstitutional it can be severed from the act. (Assignments of Error 1, 7, 8, 9, 12, 2, 3.)

C. The permit fee is not excessive in amount, either as a charge for the privilege of using the highways, or as a policy power regulatory fee. (Assignments of Error 1, 7, 8, 9, 12, 2, 3.)

III

The provision in Chapter 402, that the included class shall be subject to all of the laws relative to transportation for hire by motor vehicle, does not violate the Fourteenth Amendment, either in imposing unconstitutional restrictions upon appellee, or in making him assume the status of common

carrier against his will. (Assignments of Error 3, 4, 5, 6.)

ARGUMENT

I

CHAPTER 402 DOES NOT DISCRIMINATE AGAINST OR BURDEN INTERSTATE COMMERCE, OR DENY EQUAL PROTECTION OF THE LAWS

The questions arising from appellee's claims and the district court's conclusions (R. 7, 8, 44) that Chapter 402 discriminates against interstate commerce contrary to the Commerce Clause (Article 1, section 8, cl. 3), and violates the equal protection of the laws clause of the Fourteenth Amendment of the constitution, will be argued together as they involve the same facts and to a large extent the same principles of law.

The district court held the act discriminates against interstate commerce and denies equal protection of the laws because of the classification made by the first sentence of section 1 as follows:

> "The term 'caravaning' as used in this act shall mean the transportation from without the State of any motor vehicle operated on its own wheels, or in tow of another motor vehicle, for the purpose of selling or offering the same for sale to or by any agent, dealer, manufacturers' representative, purchaser or prospective purchaser, whether such agent, dealer, manufacturers' representive, purchaser or prospective purchaser may be located within or without this State."

This court in *Morf* vs. *Bingaman*, 298 U. S. 407, sustained a New Mexico statute which separately classified and imposed special license fees upon the movement, in interstate or intrastate commerce upon the public highways, of motor vehicles on their own wheels for purpose of sale, the evidence showing such movement to be by caravans or processions. The effect of that decision is to leave but two principal questions for solution in this division of the argument: Whether the statute here involved discriminates against interstate commerce or denies equal protection of the laws because, (a) it is limited to "transportation from without the state," and (b) it is not confined to the operation of fleets or "true caravans" but includes also single cars moved alone.

These questions are related. The New Mexico statute considered in *Morf* vs. *Bingaman, supra*, was not restricted in terms to caravan movements, but included as well single cars moved alone. Without deciding the effect upon the statute of its inclusion of single cars in the class, this court held it valid as to the party there attacking it (appellee here) because he moved all of his vehicles in caravans. That also is true in the instant case, as we shall later point out herein. And an analogous factual situation is present with respect to the provision of the California law restricting it to the movement of cars from without the state. The facts are (1) that the caravan or fleet movement, classification of which was sustained in *Morf* vs.

Bingaman, supra, is practiced only by those moving automobiles on their own wheels for purpose of sale from without the state, and (2) all of the cars moved on their own wheels from without the state for purpose of sale are moved in caravans. Hence the act by apt description includes all of those, and only those, engaged in moving motor vehicles on the California highways in caravans or fleets. As the class includes all caravaners, the act discriminates against no one. Where an evil exists the class may properly be defined by describing "those from whom the evil mainly is to be feared," *Patsone* vs. *Pennsylvania,* 232 U. S. 138 at 144, although the classification, viewed apart from experience and solely in the terms of the statute, appears illogical, *Patsone* vs. *Pennsylvania, supra; Central Lumber Co.* vs. *South Dakota,* 226 U. S. 157. The class defined in Chapter 402 aptly describes the classification held valid in *Morf* vs. *Bingaman, supra.* We proceed to a fuller discussion of the evidence.

I-A

THE LIMITATION OF CHAPTER 402 TO THE MOVEMENT OF VEHICLES FROM WITHOUT THE STATE DOES NOT CAUSE ANY DISCRIMINATION OR BURDEN INTERSTATE COMMERCE.

The act does not discriminate against interstate commerce or deny equal protection of the laws because there in fact does not exist any class in whose favor it discriminates. This is so because:

(a) The movement of motor vehicles on their own wheels for purpose of sale from without to within the state is conducted by groups or fleets with many attendant evils; (b) there is no movement of motor vehicles on their own wheels for purpose of sale in groups or fleets except from without to within the state, and no other group or fleet movement of any consequence; (c) there is a small amount of movement of motor vehicles on their own wheels for purpose of sale intrastate in California, but such movement is by single vehicles alone and not in fleets, and without the evils present in the movement from without the state, and such vehicles are subject to other license and tax requirements: (d) the definition of the class made by the act was adopted by the legislature as the description of a well-defined class and such definition includes all of those who move vehicles on their own wheels in fleets or groups; the definition describes those whose practices create the special difficulties of the fleet movement, and does not include any others.

Before proceeding with the argument it should be noted that the burden was on appellee to show that Chapter 402 discriminates against interstate commerce and denies equal protection of the laws by alleging and proving facts showing actual discrimination. *Such allegations and proof are necessary even where an act by its terms show possibilities of unconstitutional discrimination. Interstate Busses Corp.* vs. *Blodgett,* 276 U. S. 245; *Gregg Dyeing Co.* vs. *Query,* 286 U. S. 472; *Pull-*

man Co. vs. *Knott*, 235 U. S. 23; *St. Louis, I. M. & S. R. Co.* vs. *Arkansas*, 240 U. S. 518; *Williams* vs. *Baltimore*, 289 U. S. 36; *Kookee Consol Coke Co.* vs. *Taylor*, 234 U. S. 224; *Lindsley* vs. *Natural Carbonic Gas Co.*, 220 U. S. 61; *San Luis Obispo County* vs. *Murphy*, 162 Cal. 588.

But the allegations of appellee's bill of complaint charging discrimination (R. 7–8) are no more than the barest of legal conclusions; they allege no facts upon which to base charges of discrimination against interstate commerce and denial of equal protection of the laws (compare *Missouri Pacific R. Co.* vs. *Norwood*, 283 U. S. 249); and appellee offered no proof whatsoever of any actual discrimination.

Nevertheless, appellants introduced evidence to show that no discrimination in fact is made by the act. And although after such evidence was introduced appellee himself became a witness in his own behalf, he did not either in his own testimony or by other evidence contradict or explain appellants' evidence on this point.

To show that no discrimination is made we first review briefly the evidence as to the practices prevailing in the movement of cars from without the state for purpose of sale. Such cars are moved in caravans ranging from eight to fifty cars, the average in appellee's caravans being twelve (R. 47, 51, 56, 62). (Appellee's claim that he moves 30 to 40 per cent of his cars alone and not in

caravans will be considered later and be shown by appellee's own testimony to be without foundation.) A caravan of more than four cars is a highway hazard (R. 55, 56). Many of the cars in caravans are joined in two-car hookups with the driver in the front car; 60 to 70 per cent of appellee's cars are moved in such two-car hookups (R. 48, 49, 60). The rear car has a tendency to skid and to swing out of its traffic lane. The tail light on the rear car is not lighted, obviously to save exhausting the battery as the towed car is not in gear. The cars are driven so closely together as to prevent other vehicles going around them or to make passing hazardous (R. 47–49, 51, 53). Caravans are driven at varying rates of speed differing from the speed of other traffic (R. 54). The drivers are mostly nonresidents unacquainted with and unobservant of California traffic laws, and many of them are casually procured by radio and other advertising for the purpose of the trip only (R. 54, 59). The conditions of hazard and law violations attending caravan movement are the rule and a caravan that is operated otherwise is a very noticeable exception (R. 49). These conditions caused wrecks and general complaints and necessitated additional traffic officers before Chapter 402 was enacted (R. 52, 55), and such conditions led to its enactment (R. 55, 59).

All this is conceded, though minimized, in the district court's opinion (R. 77), and in the ninth

affirmative finding of fact (R. 38), although in the latter it is qualified by stating, contrary to specific evidence on the precise point, that these difficulties are the exception rather than the rule. The evidence expressly is that these hazards and law violations are the rule and not the exception (R. 49). A review of the testimony will show that the district court was not justified in minimizing the effect of this evidence.

It was held expressly in *Morf* vs. *Bingaman, supra,* that traffic of this kind may be separately classified. See also *Continental Baking Co.* vs. *Woodring,* 286 U. S. 352 at 373. The dissenting opinion plainly took the correct view (R. 93–94).

Such traffic and practices exist on the California highways only among those who move automobiles on their own wheels from without the state for purpose of sale. It was the actual practice of those defined in the class that prompted the statute. There is no such traffic either in intrastate commerce or other interstate commerce in the state. As to this the evidence is clear and uncontradicted, shown by the testimony of several witnesses, including appellee. R. W. Martland, Jr., editor of an automobile trade paper published at San Francisco, who for more than two years personally investigated the caravanning of automobiles into California, testified:

> "In the caravaning from one point to another point in the state they do not run the cars to-

gether like the caravaning of cars from without the state to within the state. Cars that are moving to more favorable markets, such as from Los Angeles to San Francisco, what little movement there is, are driven singly and usually by employees of the dealers. I can't say I have ever seen a convoy of cars moving intrastate. I don't say it doesn't exist, but I have never seen it. So far as I know they would drive them one at a time and not in a train of cars." (R. 58.)

It is apparent that the witness used the term "caravaning" in the generic sense of the movement of motor vehicles on their own wheels for purpose of sale, as it is much used in the evidence and indeed in the act itself as meaning the movement of one or more vehicles regardless of whether in fleets or not.

That evidence is not contradicted. Although appellee thereafter testified, he did not question this statement and offered no evidence to the contrary; rather, his own testimony directly supports it.

Mr. Martland further testified:

"Most of the caravans originate in Detroit, South Bend, and Kenosha, Wisconsin. I have followed them through Utah, Nevada, and into California, and in California." (R. 56.)

Appellee testified as to the cars purchased by him in 1935:

"Out of 3000 cars bought this year, probably fifty were purchased in California. The original idea in organizing in those states is that used cars can not be purchased in California to any

great extent. *The reason for my business is that dealers demand used cars and they come to me to get them because I have available cars, and they cannot get them in any other way.* If the used car industry is to exist they must get used cars from without the State of California." (R. 63.)

Obviously, if used cars can not be obtained for the trade in California, or are obtainable only in the ratio of 50 to 3000, there is no appreciable movement intrastate in California of used cars on their own wheels for purpose of sale. And clearly, and precisely as Martland testified, such an inappreciable volume in the course of eleven months or a year would not be collected into fleet or caravan movements but would be single movements.

In his recross-examination of the witness Martland on this point, appellee did not attempt to discredit this testimony, but apparently only tried to create the inference that appellee moves some of his cars from Los Angeles to San Francisco (R. 58). In his own testimony appellee indicates that after his cars arrive in Los Angeles he sells some to dealers in other California cities and in Seattle and Portland, and that such cars are moved to their new destinations on their own wheels, without specifying whether they are in fleets or singles (R. 61). It would appear that by the foregoing appellee is attempting to show a substantial volume of intrastate movement of cars on their own wheels for purpose of sale, in order to lay a factual basis for his charge

of discrimination. But the showing of such facts only attests more plainly the propriety of the classification.

If the act required a permit for an intrastate movement, such vehicles, after coming to rest in Los Angeles, would require another permit for the succeeding movement, intrastate or interstate. As it is, the original permit suffices for such movement for a period of ninety days (Sec. 4). A permit is required for a car brought into the state for purpose of sale. After such car comes in, any later movements for purpose of sale can be made under such permit or under the regular registration license, and without a second imposition of the caravan law fee.

The only showing of intrastate movement or of movement from within to without the state is that of cars brought in under the caravan law permits. Properly, the act does not impose an additional license fee for the succeeding movements of such cars.

Continuing with other witnesses on this point, the testimony of the Chief of the California Highway Patrol, E. Raymond Cato, shows that the movement of motor vehicles by caravans on the California highways originates outside the state. Such traffic commences at the border where the caravans come in. Thus in January or February, 1935, six months before the law was enacted and nine months before it became effective (hence before there was any watching at the border to collect license fees from incoming

cars), the six additional highway patrolmen specifically assigned to regulating caravans were stationed at the border counties of Imperial, Riverside, and San Bernardino (where enter the highways leading into southern California), and in the border counties of Nevada and Placer (where enter the highways into the central part of the state) (R. 52). The reason for the appointment and stationing of the officers at these points was because

> "* * * we found great fleets of cars coming through and at this time there was no caravan law requiring them to travel fifty feet apart and wrecks were reported. We had numerous complaints from citizens being crowded off the highways." (R. 52.)

The same witness testified as to conditions long before the act was passed, and which eventually led to its passage, showing the fleet problem to be the movements of cars from without the state:

> "In the years 1931 and 1932 particularly, caravaning of motor vehicles into the state was called to my attention by complaints from citizens. Committees of citizens called on me in Sacramento and insisted that we stop caravaning. We could find no law to stop it, so we made a check-up to see what caravaning was, as I was unfamiliar with it at that time. We found fleets of automobiles being towed into the state. Citizens complained that they were a hazard on the highways and were dropping itinerants into the State of California. The matter was brought before the last session of the legislature, and I appeared and

testified before a committee of the legislature." (R. 52.)

And he further testified:

> "The drivers of caravan cars do not drive at approximately the maximum speed as resident drivers, I cannot say why. They are unfamiliar with California rules of the road, at least not observing in some instances and the fact that they drive too closely together, and towing another car, creates an additional hazard. If they drive fast in swinging about it creates an additional hazard on the road. These were some of the conditions which led to the assignment of additional men, and I anticipate putting on more men. None of the six additional men we put on were because of the Caravan Act, but the six men were necessitated by the condition itself prior to the enactment of the Legislature. Since then we have put on additional men to try to enforce the act." (R. 53-54.)

In his testimony with reference to the intrastate movement of vehicles on their own wheels for purpose of sale, it is apparent that the witness used the term "caravaning," like Martland, in the sense of the movement of cars on their own wheels for purpose of sale without reference to whether in fleet or singly. Thus he said:

> "There is no caravaning of cars from within the State to without the State to my knowledge. There is transportation of cars where they haul them, and there is some caravaning of cars within the state from place to place but it is small.

I have seen a few new cars moved from place to place." (R. 54.)

This, with his other testimony, shows that in stating "there is some caravaning of cars within the state from place to place but it is small," he referred to the movement of single nonfleet cars.

In view of this testimony, and in view of the absolute lack of any evidence to support its finding, the District Court's 26th affirmative finding of fact that "there is considerable transportation wholly within the state in intrastate commerce of automobiles on their own wheels, singly, in twos coupled, and in fleets of several for the purpose of sale" (R. 41), and the statement in its opinion to the same effect (R. 81), are utterly without foundation. The dissenting opinion correctly states the evidence (R. 95).

It is submitted that the classification here made is between those who make a highly distinctive, unusual and burdensome use of the highways and those who do not make such use. The class is defined by the practical and logical means of describing those who make such use. The classification is not between those engaged in interstate and those carrying on intrastate commerce; in the words of this court in *Bradley* vs. *Public Utilities Commission*, 289 U. S. 92 at 95, the effect of the statute upon interstate commerce is "merely an incident." See the dissenting opinion (R. 93–95).

Classifications of the kind in this case are well recognized in the decisions of this court. Thus in

Continental Baking Co. vs. *Woodring,* 286 U. S. 352, there was involved a classification for purpose of taxation and regulation of those who (like appellee) were "engaged in the transportation by motor vehicle of property sold or to be sold by him in furtherance of any private commercial enterprise." (286 U. S. at 357, note 1-(d)). The act was attacked as violative of the commerce clause and equal protection clause on the ground, among others, that it exempted from the classification "the transportation of live stock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle." (286 U. S. at 371.) It should be kept in mind that Continental Baking Co. was engaged in interstate commerce, transporting its own property to market in its own vehicles. The exemption favored those doing precisely the same thing, many of them obviously engaged solely in intrastate commerce. This court recognized, however, that the true basis of the classification was not between those engaged in interstate and those engaged in intrastate commerce, but was, as is true in the instant case, between those conducting habitually a burdensome motor vehicle traffic and those making a comparatively slight use of the highways. On this the court said (286 U. S. at 373):

> "The (District) Court found a practical difference between the case of appellants 'who operate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to customers' and that

of 'a farmer who hauls his wheat or livestock to town once or twice a year'. *The legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations, which by reason of their habitual and constant use of the highways brought about the conditions making regulation imperative and created the necessity, for the imposition of a tax for maintenance and construction.* As the court said in *Alward* v. *Johnson,* 282 U. S. 509, 513, 514: 'The distinction between property employed in conducting a business which requires constant and unusual use of the highways, and property not so employed, is plain enough.' See also *Bekins Van Lines* v. *Riley,* 280 U. S. 80, 82; *Carley & Hamilton* v. *Snook,* 281 U. S. 66, 73." (Italics added)

The same principle is voiced in *St. Louis, I. M. & S. R. Co.* vs. *Arkansas,* 240 U. S. 518. The statute prescribed a minimum switching crew when switching across public crossings in cities but exempted companies operating railroads less than 100 miles in length. Against the claim of violation of the Fourteenth Amendment and the commerce clause, this court said:

"A more serious objection is that certain terminal companies, one at the city of Helena and one at Fort Smith, do switching for certain connecting trunk lines, and yet, by reason of their length being less than 100 miles, are not covered by the act. Indeed, it is said that one of them, that at Fort Smith, does switching over some of the same crossings that plaintiff in error does.

> The distinction seems arbitrary if we regard only the letter, but there may have been considerations which determined it, and the record does not show the contrary. We have recognized the impossibility of legislation being all-comprehensive, and that there may be practical groupings of objects which will as a whole fairly present a class of itself, although there may be exceptions in which the evil aimed at is not deemed so flagrant."

In that case, again, there was a classification, superficially, as here, between interstate and intrastate commerce, between the interstate railroad and the intrastate terminal. But the court recognized such was not the real basis of the classification but was only an incident of it, and that the true ground of the classification, as here, lay elsewhere.

In *Sproles* vs. *Binford,* 286 U. S. 374, there were motor vehicle length and load limitations, with exemption to vehicles operated "between points of origin, or destination, and 'common carrier receiving or loading,' or unloading points." (286 U. S. at 393.) The exemption was sustained because relating to shorter hauls than made by the included class and because "those who come within the exception transport under distinctly different circumstances from other persons using the highways." (P. 394.)

Now this again was a classification between interstate and intrastate commerce; the general limitations applied to vehicles employed in interstate

operations (pp. 389-390), while the exception necessarily was confined to traffic conducted within the areas defined, most of which areas, perhaps all, necessarily would lie entirely within the boundaries of the state (pp. 394-395). But this court recognized that the classification was not actually between interstate and intrastate commerce, that the effect on interstate commerce was "merely an incident" (289 U. S. at p. 95), and that the justifiable basis of the classification was the difference between two forms of vehicular traffic.

In *Hicklin* vs. *Coney*, 290 U. S. 169, and in *Aero Mayflower Transit Co.* vs. *Georgia Public Service Commission*, 295 U. S. 285, this court again upheld state statutes making classifications superficially between interstate and intrastate commerce, but actually, as in the instant case, between substantially different ways of conducting motor vehicle operations.

In *Railroad Co.* vs. *Husen*, 95 U. S. 465, it is stated in substance and effect that if the act is one of regulation and not of prohibition, and the regulation is one of vital necessity, promotive of domestic order, morals, health and safety, it is valid under the police power of the state even though it directly affects interstate commerce, if the right to regulate is not carried beyond the scope of that necessity.

In *New Mexico, ex rel. McLean* vs. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38, a New Mexico statute was considered which required inspection of

all hides being transported out of the state and charged an inspection fee therefor, but did not impose such demands upon hides remaining in the state. Against the claim that the act discriminated against interstate commerce, this court pointed out that the purpose of the law was to combat the stealing of cattle by positively insuring an inspection of brands on hides being shipped out of the state and thus being taken beyond the state's jurisdiction, a precaution not so necessary as to hides remaining in the state. The court's reasoning in that case is plainly applicable to the present case, and the court made a statement altogether in point here (at page 54):

> "But legislation is not void because it meets the exigencies of a particular situation."

A classification somewhat similar to the one upheld in the last mentioned case was sustained in *Turner* vs. *Maryland,* 107 U. S. 38, though the *Turner* case is weaker than the preceding one.

As this court said in *Miller* vs. *Wilson,* 236 U. S. 373:

> "Dealing with practical exigencies, the legislature may be guided by experience."

In *Pullman Co.* vs. *Knott,* 235 U. S. 23, a gross receipts tax was involved, as to which the court said:

> "It is suggested that there is an arbitrary classification because the tax is confined to sleeping and parlor car companies, and does not fall upon railroads operating their own sleeping

and parlor cars. If otherwise this were a valid objection, as to which we need express no opinion, it is enough to say that a tax is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are. *Keokee Consl. Coke Co.* v. *Taylor,* 234 U. S. 224. It does not appear that any railroad in Florida does operate its own sleeping or parlor cars, and the attorney general of the state denies that such a case exists."

I-B

THAT CHAPTER 402 IS NOT IN TERMS LIMITED TO THE MOVEMENT OF FLEETS OR CARAVANS BUT INCLUDES SINGLE CARS DOES NOT RESULT IN ANY DISCRIMINATION, OR BURDEN INTERSTATE COMMERCE

1. There is no appreciable movement of single cars from without the state.

Appellee claims that thirty to forty per cent of the cars he brings in come in singly and without regard to any other cars coming in, and hence, not being part of a caravan or two-car hook-up movement, can not properly be included within the class, and that to include them discriminates against him in favor of the movement of single cars not for sale into California and such single car movement as there is for purpose of sale intrastate in California.

To this there are several answers. Before proceeding with them, however, appellee's evidence as to his movement of single cars should be analyzed.

Upon analysis it will be found that no such single car, noncaravan movement exists as to appellee's cars, that sixty to seventy per cent of appellee's cars are brought in with one car towing another, and in caravans, and that the remaining thirty to forty per cent are necessarily divided among the caravans as single, nontowing cars driven as part of the caravan by the caravan manager, by the caravan mechanic or "trouble shooter," and by other single car drivers. Appellee testified (italics are supplied):

> "In the operation of my business, approximately thirty to forty per cent of the automobiles are driven into the state of California alone, as a single unit, with one driver driving an automobile, *and the balance are brought into this state with one automobile towing another.* (R. 60.)
>
> "When I speak of bringing cars in, and thirty or forty per cent being single cars without having a car attached thereto, I mean that such car comes through alone, without regard to any other cars coming into California." (R. 60.)
>
> "In every instance, the actual buyer, who handles the funds for the company, hires his drivers, and has his regular drivers, comes through with the caravan of automobiles. We also have a 'trouble shooter' with these cars, who looks after the mechanical condition of the cars." (R. 62.)
>
> "In caravans, the average number of cars is twelve, to which are assigned one 'trouble

shooter', and one man to every two cars. *The trouble shooter and the buyer or manager in charge of these caravans always drive single cars.*" (R. 62.)

"The average number of cars in a caravan is about twelve, and the number of drivers varies. All are in charge of the caravan manager and actual buyer. *Their instructions are to have a driver for every single unit coming through and one driver for every hook-up.* Occasionally relief drivers are brought through. The supervisors drive a single unit." (R. 63.)

It thus appears clearly and definitely that sixty to seventy per cent of the cars appellee brings in are in two-car hook-ups with one driver driving the two cars. (In *Morf* vs. *Bingaman, supra,* it was appellee's evidence that seventy-five to eighty per cent of his cars were moved in two-car hook-ups.) It further appears clearly and definitely that in every caravan, which averages about twelve cars, at least two of such cars are driven singly and not in tandem *but in the caravan,* they being the cars driven by the buyer and the trouble shooter. It further appears, from the last italicized portion above, that there are other single units in a caravan in addition to those driven by the buyer and the trouble shooter. The testimony of Highway Patrolman Walsh shows that in the caravans there are a considerable number of single cars not joined in hook-ups (R. 49).

Plainly then, thirty to forty per cent of the automobiles appellee brings in *do not* "come through

alone, without regard to any other cars coming into California." Such thirty to forty per cent are scattered among the cars driven by the buyer and by the trouble shooter and the other single units in the caravans, but all accompanying and part of the caravans.

This is evident from the application of simple arithmetic. The average number of cars in a caravan is twelve, and appellee brought in approximately three thousand cars in the first eleven months in 1935. This approximates two hundred and fifty caravans. The two cars driven singly in each caravan, one by the buyer and one by the trouble shooter, would thus account for five hundred single cars or sixteen and two-thirds per cent of the three thousand cars. As above shown the buyer and the trouble shooter are instructed to have a driver for each single unit in a caravan as well as a driver for each hook-up. If there is one single unit in a caravan in addition to the buyer and the trouble shooter that accounts for twenty-five per cent of the three thousand cars, and if two such additional single units thirty-three and one-third per cent.

It is submitted that the foregoing accounts for the thirty to forty per cent of the cars driven into the state as single units by appellee. Sixty to seventy per cent are driven in two-car hook-ups, and in caravans averaging twelve cars each, and the thirty to forty per cent of single cars are largely

scattered among the caravans. This is inescapable from appellee's own testimony.

2. Even though the movement of cars from without the state should include a considerable number of single cars, this would not invalidate the classification.

The evidence is that cars coming into the state for purpose of sale are in caravans, with all the evils attendant on such movement. There is no evidence of any appreciable movement of single cars not in caravan from without the state except the reference thereto in appellee's testimony. And appellee's testimony, as above shown, when considered in its entirety, shows no appreciable amount of single car noncaravan movement, if any.

However, if there were a considerable number of cars moved singly and alone from without the state for purposes of sale, that would not necessarily invalidate the classification. This is so for several reasons.

(1) The first reason goes to the causes and motives for the practice of moving automobiles in caravans. This practice is not mere happenstance; it originated as the most practicable method of moving large numbers of motor vehicles long distances on their own wheels. So the practice of bringing automobiles into California for purpose of sale gave rise to the practice of moving them in caravans in which many of the cars are in tandem hook-ups. (See statement to like effect in *Morf* vs. *Bingaman, supra.*) Appellee conducts his busi-

ness in that way, as do all others similarly engaged. The evidence shows the advantage of that method of conducting the business. If vehicles are to be driven across several states by drivers variously, often casually procured, it is obviously advantageous to have such vehicles accompanied by and in charge of a manager and a "trouble shooter" or mechanic. Particularly is this true of used vehicles whose past history and present fitness are unknown and which are about to be intrusted, on many if not most occasions, to a driver of similar attributes. Sending such a car and driver on a thousand or two thousand mile trip entirely alone is plainly not good business. So the cars are dispatched in caravans of a size which makes it economically sound to have them in charge of a manager and a mechanic to see that they promptly and safely arrive at destination.

It was this practice that produced the evils and difficulties shown in the evidence and which induced the enactment of the Caravan Law. The legislature was confronted with a practical problem, one part of which was the description of the class. As it was the practice of bringing cars into the state from without the state on their own wheels for purpose of sale which gave rise to the practice of caravaning and its attendant evils, so the legislature described the class in the terms of the practice which created the evils and induced the law.

The district court thought the classification bad and inferred the class might have been more aptly described (R. 79–80). Due consideration of the problem facing the legislature, however, furnishes convincing proof that the definition made in Chapter 402 accurately circumscribes the class and is the only workable one. The difficulties which the legislature and enforcing officials would have encountered had the legislature attempted to define the class as those who moved vehicles in caravans (as the district court apparently thought it should have done, R. 79–80), are evident. The enforcing officers would have been confronted with the easy evasion of stringing caravans out with a mile or so between cars upon approaching the border station and entering the state, and then closing up into standard caravan formation after getting into the state and out of sight of the border station. True, traffic officers in the interior of the state would have caught some of the evaders, but many would escape. The difficulties are obvious.

The question of the constitutionality of a classification so described also would arise. The difficulty would not be the classification between caravan and noncaravan movement, but rather the vagueness and workability of the classification. That is, when is a caravan not a caravan: what distance, or lack of distance, between cars determines whether they are in caravan, and how many cars how close together make a caravan? That

again suggests insurmountable difficulties of law drafting, and of action and interpretation facing enforcement officials. If a caravan were defined in terms of distance between cars, how easy it would be, accordion-like, to expand and contract in length according to the proximity of enforcing stations and officers. (See Dissenting opinion, R. 93-95.)

Clearly the definition of the class used by the legislature was the logical and workable one. If a common practice creates well defined difficulties which call for legislative action, what better way to define the class than to include those following such practice and none others? *Central Lumber Co.* vs. *South Dakota,* 226 U. S. 157; *Patsone* vs. *Pennsylvania,* 232 U. S. 138.

Now as those engaged in the practice must be classified in terms of the practice because of the necessity of drafting a workable statute, they can not complain because the class sometimes includes variations or departures by them from the particular practice at which the statute is aimed, where such variations and departures are so closely related to the practice as to be within the definition of the class, or are, in truth, an integral part of the practice. It is well settled that a legislature faced with the practical problem of defining the boundaries of a classification may include reasonable margins to avoid vagueness and insure workableness and effective enforcement.

Applicable here is the doctrine, invoked in varied situations, of *Purity Extract & Tonic Co.* vs. *Lynch,*

226 U. S. 192. A law forbidding the sale of intoxicating liquors also forbade the sale of nonalcoholic malt liquors. It was held that the inclusion of the nonintoxicating malt liquors in the prohibition was sustainable as a means of preventing evasions of a law actually aimed at intoxicants. On the question this court made an oft repeated statement (at page 201):

> "It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. * * * The statute establishes its own category. The question in this Court is whether the legislature had power to establish it. The existence of this power, as the authorities we have cited abundantly demonstrate, is not to be denied simply because some innocent articles or transactions may be found within the proscribed class."

Likewise in *Euclid* vs. *Ambler Realty Co.*, 272 U. S. 365, this court said (at page 388):

> "Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive or dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this Court has upheld, although drawn in general terms so as to include indi-

vidual cases which may turn out to be innocuous in themselves (citing cases). *The inclusion of a reasonable margin to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity.* Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation." (Italics supplied).

Equally in point on other aspects of the rule above stated are *New York* vs. *Hesterberg*, 211 U. S. 31; *Hebe Co.* vs. *Shaw*, 248 U. S. 297; *Pierce Oil Corp.* vs. *Hope*, 248 U. S. 498.

Applicable here also is the rule that a classification having some reasonable basis is not invalid "because in practice it results in some inequality", *Lindsley* vs. *Natural Carbonic Gas Co.*, 220 U. S. 61 at 78, or "even though it bear hard in some particular case," *Bain Peanut Co.* vs. *Pinson*, 282 U. S. 499 at 501.

(2) Another reason is that single cars moved alone on their own wheels for purpose of sale would be properly subject to classification. Such cars are driven for the purpose of direct commercial gain and profit. They are in a class apart from the great host of automobiles operated by their owners for private purposes.

In *Hodge Drive-It-Yourself Co.* vs. *Cincinnati*, 284 U. S. 335, it was held that single cars rented to drivers could be subjected to license fee and safety

requirements more onerous than those imposed upon private automobiles driven by their owners. There are many points of similarity between the automobile operations classified in the *Hodge* case and the movement of single cars not in caravan from without the state for purpose of sale. These are more particularly disclosed by a reading of the opinion of the Supreme Court of Ohio (123 Ohio St. 284, 175 N. E. 196), affirmed by this court in the *Hodge* case. Some of the grounds noted by the Ohio court for sustaining that classification are similar to the reasons expressed by this court for sustaining the New Mexico caravan law in *Morf* vs. *Bingaman, supra.* One element sustaining the classifications mentioned by both courts is that the drivers are not owners of the cars and are casually procured, hence having less sense of responsibility for safety than owner-drivers. Another is that in both cases the owners of the cars are using the highways for direct commercial gain, as a place to conduct a private business differing radically from ordinary uses and subjecting the ordinary users to unusual hazards.

In *Continental Baking Co.* vs. *Woodring,* 286 U. S. 352, it was held that one transporting his own property (bakery goods) over the public highways in his own motor vehicles, in interstate commerce, for sale to customers, could be classified separately for taxation and regulation from others carrying their own property for sale in their own motor vehicles, in intrastate or interstate commerce, because of an

unusually burdensome use of the highways. There is great similarity between that and the instant case. It is not a material difference that in the instant case the motor vehicle driven is itself both the article of commerce and the conveyance. In each case the material element is that the owner of the vehicle is using it to transport his property for purpose of sale and is making a continuous and burdensome use of the highways, even where the vehicles are moved singly and not in fleets.

At this point appellee may urge that the foregoing does not take into account that cars moved singly intrastate for purpose of sale are not subject to Chapter 402. Several answers to this have already been given: (1) the class defined in the statute, and appellee in particular, move their vehicles in caravans, hence can not complain that single cars moved intrastate are not in the class (*Morf* vs. *Bingaman*, 298 U. S. 407); (2) assuming *arguendo* some single cars not in caravan may be moved by the included class, this is incidental to the caravan movement and is a permissible and necessary margin for accuracy in definition of the class and workableness of the statute; (3) there can not be any appreciable volume of used cars moved intrastate for purpose of sale as appellee's testimony indicates that used cars are obtainable in the state for sale, in proportion to used cars brought from without the state, in the ratio of 50 to 3,000 (R. 63), and appellee brought in three-fourteenths of the total number of

cars moved into California on their own wheels for purpose of sale in 1935 (R. 58); (4) the only evidence in the record as to the source of any cars moving intrastate on their own wheels for purpose of sale is that such cars originally, and shortly prior to their intrastate movement, were brought in from without the state (R. 61); (see the dissenting opinion, R. 95) that is, there is no identification in the record of any indigenous intrastate movement.

However, a further defense of the classification between single cars not in caravan moved from without the state for purpose of sale, assuming such movement exists in appreciable volume, and single cars moved intrastate for purpose of sale, also assuming an appreciable volume of such movement, is that the latter, though exempt from the $15 permit fee, (a) compose a substantially different type of traffic than the movement from without the state, and (b) pay other and different license fees, hereinafter enumerated.

It should be kept in mind that single cars moved from without the state for purpose of sale obviously travel from the eastern border of the state to the coast cities where the markets are situated (R. 4, 60). This may involve a distance of 280 miles from Yuma, Arizona, to Los Angeles; a distance of 475 miles from the California line near Reno, Nevada, to Los Angeles; a distance of 235 miles from the California line near Reno to San Francisco; a distance a 670 miles from Yuma to San Francisco; etc. After com-

ing to rest in Los Angeles about one-half of the appellee's cars go farther; some of them are taken by appellee to San Francisco, 400 to 470 miles from Los Angeles; and some to states north of California, thus travelling from Los Angeles to the northern boundary of California, a distance of 950 miles (R. 61).

There is nothing in the record indicating the distances of the movement of cars intrastate on their own wheels for purpose of sale, except as to cars originally brought in from without the state.

The class of drivers operating cars brought in from without the state for purpose of sale is such as to make the operation of such cars on the highways distinctly more of a hazard and problem than the operation of the purely intrastate traffic (R. 53, 54, 57, 58). The fraudulent registration and stolen car hazards are present in the single car traffic from without the state equally with the caravan movement (R. 57, 59).

Such being the record, it may well be, and there is no showing to the contrary, that the license fees required for the movement of single cars intrastate on their own wheels for purpose of sale on which the $15 permit fee is not required by Chapter 402, are such as to equalize the position of the class to which they apply with the position of the single, noncaravan vehicles subject to Chapter 402, under the rule of *Interstate Busses Corporation* vs. *Blodgett*, 276 U. S. 245. And see *Gregg Dyeing Company*

vs. *Query*, 286 U. S. 472; *General American Tank Car Corporation* vs. *Day*, 270 U. S. 367; *Travelers Insurance Company* vs. *Connecticut*, 185 U. S. 364.

Thus those operating motor vehicles on their own wheels for purpose of sale other than under the permit provided by Chapter 402 must pay the following described fees, which of course can not be required of operators moving vehicles under the permit issued pursuant to Chapter 402. Vehicles moved intrastate and commencing their journey originally intrastate have already been registered and the $3 fee paid under Section 370 of the California Vehicle Code (Appendix B). The license fee required by Chapter 362, Statutes of 1935, of California, also has been paid (Appendix C). Those are the basic license fees paid by owners of motor vehicles registered in the state.

Appellee testified to the effect that in his opinion, based on his experience, there is no danger in two-car hook-ups, and that he had had no accidents and none of his drivers ever had been arrested in his caravanning operations (R. 62). A traffic officer testified, however, to one specific instance in which one of appellee's caravans consisting of thirty-four cars required supervision by reason of driving too closely together, defective lights, and blocking the highway (R. 47, 48). The hazards and evils caused by the caravanning practice in general have been heretofore shown. Appellee's contention that he conducts his business in such a way as to cause no

highway difficulties is easily answered. In the first place the fee is charged for the use of the highways in the operation of what is essentially a transportation business. And in the second place, as far as regulation is concerned, appellee's position is met by the fact that he carries on a business the general practice of which results in unusual highway traffic conditions requiring special regulation and justifying the exaction of a fee for such regulation and for a commercial use of the highways.

Appellee's complaint is answered by *Murphy* vs. *California,* 225 U. S. 623, and kindred cases. A municipal ordinance forbade the keeping of public billiard or pool halls, but permitted a hotel with twenty-five or more bedrooms to maintain billiard tables for the use of regular guests only. Murphy claimed, among other things, that his pool hall was free from all evil and hence no more to be suppressed than any other orderly business. On this contention this court said (at page 629):

> "* * * where, in the exercise of the police power, the municipal authorities determine that the keeping of such resorts should be prohibited, the courts cannot go behind their findings and inquire into local conditions; or whether the defendant's hall was an orderly establishment, *or had been conducted in such manner as to produce the evils sought to be prevented by the ordinance.*" (Italics supplied.)

II

THE PERMIT FEE OF $15 PER CAR REQUIRED BY CHAPTER 402 IS NOT EXCESSIVE OR UNREASONABLE; IT IS A CHARGE FOR THE PRIVILEGE OF USING THE PUBLIC HIGHWAYS FOR A DISTINCTIVE COMMERCIAL USE AND IS A POLICE POWER LICENSE FEE, AND ITS EXACTION DOES NOT VIOLATE THE 14TH AMENDMENT OR THE COMMERCE CLAUSE

A. The district court found as a fact that the $15 permit fee is excessive and unreasonable (affirmative findings of fact 20 to 23 R. 40-41). Examination of such findings and of the court's opinion (R. 82-84) shows plainly that the court reached its conclusions on this point because it entertained an erroneous conception of the law. We wish to state that even if the court's theory of the law had been the correct one, nevertheless there is no evidence to support its findings of fact, and we shall later show this more fully as we proceed with the argument, but at this immediate point we desire to demonstrate the error of law into which the district court fell and show that the application of correct legal principles establishes that the fee is not excessive and is reasonable.

The district court erroneously thought the fee (1) is exacted only as a police power license charge for regulation of the licensed traffic and that its reasonableness must be measured solely by the cost of such regulation, and (2), correlative with (1),

that the fee can not be justified as a charge for the privilege of using the state's highways. It apparently thought these conclusions were required by reason of the terms of Chapter 402, particularly section 6 thereof, which is:

> "All fees from the issuance of permits collected by the Motor Vehicle Department under this act shall be paid into the general fund in the State treasury.
>
> "Said department shall file with the Controller on or before February first and August first of each year a detailed account of the receipts of said Department from this source for the six months next preceding. The moneys so derived by the State are intended to reimburse the State treasury for the added expense which the State may incur in the administration and enforcement of this act and the added expense of policing the highways over which such caravaning may be conducted, so as to provide for the safety of traffic on such highways where caravaning is being conducted."

The theory upon which the court based its decision on this point is shown by the following excerpts from its opinion (R. 82, 83):

> "It is argued that the state may charge for the commercial use of its highways. We have already stated that the use plaintiff makes of the highways is not a privilege that will support a tax under the act for other than such extra policing reasonably required by fleet movement. But aside from that there is no basis in the act upon which a highway tax can be estimated or

calculated. As to purposes of fee, see: *Interstate Transit Inc.* v. *Lindsey*, 283 U. S. 183; *Kane* v. *New Jersey*, 242 U. S. 160; *Sprout* v. *South Bend*, 277 U. S. 163, at 170 and 171; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245."

"For the theory of levying tax on vehicles using highways see *Interstate Transit Inc.* v. *Lindsey*, 283 U. S. 183; *Mallory* v. *Alabama*, 296 U. S. 261; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245."

It will be observed that the cases cited above by the court are those occasionally misunderstood as laying down the requirement that license fees exacted of an interstate motor vehicle operator must be devoted to highway building and maintenance. The court's misunderstanding of these cases was, we believe, the moving cause of its decision on this particular point.

The bases for claiming that the act can not be justified as imposing a charge for the privilege of using the highways seem to be these: (1) that the act in section 6 (Appendix A) does not appropriate the fees collected to the building and maintenance of highways, but instead places such fees in the "general fund in the State treasury"; (2) that in the last sentence of section 6 there is a statement of the purposes for which the fees collected are "intended to reimburse the state treasury"; and (3) that the use plaintiff makes of the highways does not permit the state to charge him therefor.

We will deal with these in the above order and show that an examination of the act in the light of the decisions of this court and of the Supreme Court of California shows plainly that the act intends and imposes (a) a charge for the privilege of using the state's highways and (b) a charge for traffic regulation. Hence the reasonableness of the fee can be measured by its dual character, and the test is not limited solely to the cost of police regulation of the licensed traffic as the district court stated in its opinion.

The point, of itself, that the act does not appropriate the fees collected to the building and maintenance of highways, but instead places the fees in the "general fund in the State treasury" is immaterial in determining whether the license fee is exacted as a charge for the privilege of using the highways. *Morf* vs. *Bingaman,* 298 U. S. 407. In that case it is held that if an act requiring a license fee of an interstate motor vehicle operator contains terms which identify the fee as a charge for the privilege of using the highways, the use made of the fees collected is of no importance. All that is required is that the act contain one or more indicia (which may or may not be the appropriation of the fees to highway maintenance) that the fee it imposes is for the privilege of using the highways. The license fee acts which have been held invalid are those lacking any indicia of the nature of the fee. *Interstate Transit, Inc.* vs. *Lind-*

sey, 283 U. S. 183; *Sprout* vs. *South Bend,* 277 U. S. 163.

And *Morf* vs. *Bingaman, supra,* definitely establishes that the act in question here is one imposing a charge for the privilege of using the highways. The same element which the court recognized in that case as identifying the license fee as a charge for the privilege of using the highways is present in the California act; that is, the payment of the fee is definitely a pre-requisite to the use of the highways. Thus this court said in *Morf* vs. *Bingaman, supra:*

> "Unlike the general tax in *Interstate Transit, Incorporated v. Lindsey,* 283 U. S. 183, the levy of which was unrelated to the use of the highways, grant of the privilege of their use is by the present statute made conditional upon payment of the fee. The manner of its collection, not unlike that of a toll for the privilege of entering and using the highways, definitely identifies it as a charge for the privilege."

The act here involved, Chapter 402, plainly fits the above. Thus it is provided in the act:

> "Sec. 2. No person, firm or corporation shall use any highway in this state for caravaning motor vehicles unless and until there shall first have been secured from the Motor Vehicle Department of the State of California a special permit as to each vehicle so caravaned, for use of the highways of this state in caravaning such vehicle * * *.

"Sec. 3. As a condition precedent to the issuance of any special permit provided for in the previous section of this act the Motor Vehicle Department of the State of California shall charge and collect a fee of fifteen dollars for each motor vehicle for which a caravan permit may be issued * * *.

"Sec. 5. The fee paid for any caravaning permit issued under this act shall be in lieu of all other registration fees and license fees for the use of public highways in this state by motor vehicle * * *." (Appendix A.)

B. With those provisions in the act, and the illumination afforded by *Morf* vs. *Bingaman, supra,* the only question remaining at this point is the effect, if any, of the last sentence of section 6. A consideration of such sentence and the law applicable thereto, as shown by other statutes of California and by the decisions of this court and of the Supreme Court of California, shows clearly and conclusively that such sentence has no effect whatsoever in altering the preceding structure of the act, which was devoted to creating a license fee charge for the privilege of using the state's highways for commercial gain.

To determine the precise meaning and effect of section 6, it is necessary to consider it in connection with other statutes. By the first sentence of section 6 all of the fees collected are required to be paid into the general fund in the State treasury. It is obvious that section 6 does not appropriate

the fees or order their expenditure; when section 6 is ended the fees are simply left in the general fund in the State treasury. The expressed intention in the last sentence of section 6, to reimburse the State treasury, does not appropriate or direct the expenditure of the fees. If that is not sufficiently plain at this point, it will be made so in the consideration of other statutes.

The general fund in the State treasury is defined in section 454, California Political Code, as follows:

> "454. General Fund. The general fund consists of moneys received into the treasury and not specifically appropriated to any other fund."

Let us assume the fees collected have been paid into the general fund. To get them out of the general fund, to expend them, requires an appropriation. Section 22 of Article IV, Constitution of California, provides:

> "No money shall be drawn from the treasury but in consequence of appropriations made by law * * *".

The last sentence of section 6 does not make the necessary appropriation; it does not contain any of the essentials of an appropriation act. Thus in *Ryan* vs. *Riley,* 65 Cal. App. 181, 223 Pac. 1027, the court, in considering what is necessary to effect an appropriation of money in the *general fund,* stated (pp. 187–188):

> "Where the appropriation is made by the legislature and the money is to be paid out of the general fund there seems to be no conflict in the cases and the appropriation must be specific both as to purpose and amount; neither of these requisites can be left indefinite and uncertain."

In that case the court points out that an act appropriating money from the general fund, where are kept the unappropriated moneys, must be couched in more definite terms than an act appropriating money from a special fund, which has, of course, already been set aside for a special purpose. The last sentence of section 6 does not meet these requirements as it does not designate, even indirectly, what state officers are entitled to expend the fees, nor the amount they are to expend. In *McCord* vs. *Slavin,* 143 Cal. 325, 76 Pac. 1104, the court said:

> "An appropriation of public moneys includes a direction or authority for their payment, as well as setting them apart for a particular purpose. Merely directing them to be paid into a particular fund does not effect their appropriation, especially if the moneys of that fund are to be applied for different purposes, as may be directed by law."

Obviously, moneys in the general fund "are to be applied for different purposes, as may be directed by law."

In *Riley* vs. *Forbes,* 193 Cal. 740, 227 Pac. 768, it was held that fees collected by administrative state officials, and intended for administration costs, if paid into the general fund of the State treasury could not be withdrawn by such officials except by virtue of an appropriation act authorizing such withdrawal.

Furthermore, if the legislature has by an act directed money to be paid into a fund for a purpose, but such act does not contain terms sufficient to appropriate such money, the legislature can by a later act withdraw the money from such designated fund and appropriate it for entirely different purposes. *McCord* vs. *Slavin, supra.*

The point of the foregoing is that the last sentence of section 6 of Chapter 402 has no effect upon the use of the money it refers to; such money would be subject to exactly the same handling as at present if such sentence did not exist. Such sentence could be lifted bodily from the act with no effect whatsoever upon the operation of the act or the use of the fees collected.

The money collected under the act can be appropriated by the legislature to the building of highways or the salaries of officers enforcing the act, or other purposes. *McCord* vs. *Slavin,* 143 Cal. 325, 76 Pac. 1104. What the legislature does with the money is immaterial on the question of the nature of the act because the act by its terms shows that it requires a fee for the privilege of using the

highways and for traffic regulation, *Morf* vs. *Bingaman*, 298 U. S. 407, both of which can be required of operators of motor vehicles in interstate commerce, *Morf* vs. *Bingaman*, *supra*.

It is therefore submitted that the last sentence of section 6 can not be looked to alone to determine the nature of the license fee required by the act. A sentence, the absence of which would have no effect whatsoever upon the operation of the act or the uses to which the money can be put, can not overcome preceding structure of the act which is devoted to creating a charge for the privilege of using the highways as well as a police power regulatory fee.

The decisions of this court clearly establish that the construction to be placed on the act is to be determined by the provisions of sections 2, 3, and 5, which mark the fee as a charge for the privilege of using the highways as well as a regulatory fee, and not by the last sentence of section 6; and this for the several reasons following.

1. The rule is that "where a federal question is involved we are not bound by the label attached to the tax or the character ascribed to the law. *We must ascertain for ourselves the true nature of the tax by ascertaining its operation and effect.*" *Schuylkill Trust Company* vs. *Pennsylvania*, 296 U. S. 113. (Italics supplied.) In *Storaasli* vs. *Minnesota*, 283 U. S. 57, the argument opposing a motor vehicle license law was that it imposed

a property tax (concededly beyond the state's power) and the state court had characterized it as such in part. This court said in sustaining the law:

> "This court, while bound by the state court's decisions to the meaning and application of the law, decides for itself the character of the tax, and whether as applied to appellant it affects his constitutional rights. We think it plain that the levy is an excise for the privilege of using the roads."

In *Johnson Transfer & Freight Lines* vs. *Perry*, 47 Fed. (2nd) 900 (D. C. Ga.), the statute defined a motor carrier license fee as an occupation tax. In holding it valid as to an interstate carrier the court said (at p. 903): "Despite this being called an occupation tax, it is in substance a tax to compensate for the use of the road." In *Macallen Co.* vs. *Massachusetts*, 279 U. S. 620, it was said at p. 625:

> "Neither state courts nor legislatures, by giving the tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect."

See, also, as stating the same rules:

United States vs. *One Ford Coupe Automobile*, 272 U. S. 321;

Educational Films Corp. vs. *Ward*, 282 U. S. 379.

2. The rule is that "where a statute is reasonably susceptible of two interpretations, by one of which it would be clearly constitutional and by the other

of which its constitutionality would be doubtful, the former construction should be adopted." *Carey* vs. *South Dakota,* 250 U. S. 118; *Knights Templars' & Masons' Life Indemnity Co.* vs. *Jarman,* 187 U. S. 197; *United States* vs. *Delaware & Hudson Company,* 213 U. S. 366; *Reinecke* vs. *Northern Trust Co.,* 278 U. S. 339; *Panama Railroad Co.* vs. *Johnson,* 264 U. S. 375. So in the present case a construction giving effect to sections 2, 3, and 5, of the act as requiring a fee for the use of the highways as well as a regulatory fee, obviously a plain and reasonable construction, should be adopted in preference to the narrow view that the last sentence of section 6 limits the measurement of the reasonableness of the fee to the cost of regulation alone.

A motor vehicle license statute precisely similar to Chapter 402 in the respects now under discussion was considered by the Supreme Court of Oregon in a leading case, *Camas Stages Company* vs. *Kozer,* 104 Ore. 600, 209 Pac. 95, 25 A. L. R. 27, and was held to "exact compensation for the privilege of operating" motor vehicles upon the public highways. The Oregon statute provided:

> "The provisions of this Act are declared to be an exercise of the police powers of the State of Oregon and this act shall be known as the 'Oregon Motor Vehicle Act.'"

And the statute further stated that its

> "* * * purpose, object, and intent is to provide a comprehensive system for the regulation of all motor and other vehicles."

Those were the only statements in the act of its purpose. The Oregon court, after discussing *Transportation Co.* vs. *Parkersburg,* 107 U. S. 691; *Huse* vs. *Glover,* 119 U. S. 543; *Hendrick* vs. *Maryland,* 235 U. S. 610; *Kane* vs. *New Jersey,* 242 U. S. 160, and other cases, held the fee was exacted for the privilege of using the highways, pointing out that the Oregon law made payment of the license fee a pre-requisite to the use of the highways.

3. The principle of the severability of the invalid in a statute from the valid. *Carey* vs. *South Dakota, supra; Presser* vs. *Illinois,* 116 U. S. 252; *Brazee* vs. *Michigan,* 241 U. S. 340; *Board of Supervisors* vs. *Stanley,* 105 U. S. 305. We think this principle is hardly required here, but it is suggestive. As above shown, the last sentence of section 6 can be severed from the act without affecting in the least its operation or the use of the fees collected.

A case closely similar in principle to the present case, though not as strong, is *Ex parte Schuler,* 167 Cal. 282, 139 Pac. 685, in which the Supreme Court of California considered an automobile license statute. One section provided the license fees should be collected by the State Treasurer. Another directed the Treasurer, after deducting

administration expense, to place one-half of the net receipts in the state "motor vehicle fund," and to return one-half to the "counties from which received." The court held the latter provision violative of the State Constitution because imposing a tax for county purposes without conforming to the constitutional requirements for legislation of that character. Nevertheless the court held the act could be sustained in its essential entirety by construing that there was a legislative intent "to impose this tax irrespective of the disposition of the proceeds," and that the provision for return to the counties of one-half of the net receipts could be disregarded, leaving all of the moneys collected in the State treasury. In the *Schuler* case a part of the statute was eliminated by construction to avoid unconstitutionality, and this changed its effect as to distribution of the license fees. In our case there is no need to pare off anything. The phraseology relied upon by appellee and the District Court in the instant case has no effect whatsoever upon the working of the act or disposition of the proceeds. On the other hand, the parts of Chapter 402 (Secs. 2, 3, 5) which indelibly stamp it as imposing a charge for the use of the highways, under the rule of *Morf* vs. *Bingaman,* 298 U. S. 407, give it life. The *Schuler* opinion refers to the "saving clause" in the act considered. However, the absence of a saving clause does not defeat the principle of severability, applied with particular

force by this court in the consideration of state statutes, *Carey* vs. *South Dakota*, 250 U. S. 118; *Board of Supervisors* vs. *Stanley*, 105 U. S. 305; *Presser* vs. *Illinois*, 116 U. S. 252; *Brazee* vs. *Michigan*, 241 U. S. 340.

C. We now proceed to a discussion of the facts relating to the question whether the fee is unconstitutionally excessive. It hardly seems necessary to observe that the burden was on appellee so to prove. *Hendrick* vs. *Maryland*, 235 U. S. 610; *Interstate Busses Corporation* vs. *Blodgett*, 276 U. S. 245; *Interstate Transit, Inc.* vs. *Lindsey*, 283 U. S. 183; *Morf* vs. *Bingaman*, 298 U. S. 407.

As shown above, the permit fee required by Chapter 402 is both a charge for the privilege of using the highways and a police power traffic regulatory fee; it is to be considered in both aspects when measuring its validity by its amount. (See cases last above cited). In *New Mexico, ex rel. McLean* vs. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38, this court considered a complaint that an inspection fee laid on hides moving in interstate commerce, but not laid on hides in intrastate commerce, produced so much income that in reality it amounted to a tax for revenue. In holding that the amount of the fee did not affect the validity of the law the court said (at page 55):

> "The law being otherwise valid, the amount of the inspection fee is not a judicial question; it rests with the legislature to fix the amount, and it can only present a valid objection when

it is shown that it is so unreasonable and disproportionate to the services rendered as to attack the good faith of the law."

The distances appellee's cars may move have been shown approximately above. The least distance any of them move is the 235 miles from Yuma, Arizona, to Los Angeles. Half of them move farther than that distance (R. 61). Some of them move on to San Francisco, 400 to 470 miles farther depending on the route. Some go from Los Angeles to states to the north, crossing the northern boundary of California 950 miles from Los Angeles. Were it not for Chapter 402 such cars could be moved 1185 miles over California's highways without paying anything for the privilege. Whatever may be the value of comparisons, in *Morf* vs. *Bingaman,* 298 U. S. 407, a fee of $7.50 per car was sustained where the car traveled just 166 miles over the New Mexico highways, and this court said:

"As the tax is not on the use of the highways but on the privilege of using them, without specific limitation as to mileage, the levy of a flat fee not shown to be unreasonable in amount, rather than of a fee based on mileage, is not a forbidden burden on interstate commerce."

The character of the commerce conducted by appellee and others engaged in caravanning has been shown. It requires and justifies regulation. *Morf* vs. *Bingaman, supra.* It stands without question in the evidence that the actual administration cost of issuing the permits provided in Chapter 402

is $5 for each permit (R. 58). An increase of clerical help was required in the Division of Registration of the Department of Motor Vehicles, at the border stations, at Sacramento, and the branch offices (R. 59). This increased organization and the caravan law have produced the very desirable result of greatly eliminating the bringing in of stolen cars and the fraudulent registration and sale of used cars as new (R. 59). In the California Highway Patrol six additional men, who could be dispensed with where employed if caravanning were entirely eliminated, were employed because of caravanning six months before the act was passed (R. 53). After that additional men were employed or assigned to the regulation of caravanning (R. 52, 53) and at the trial (November 29, 1935) the Chief of the Highway Patrol testified that the assignment of more men to such duty would be necessary (R. 54).

The district court, in its mathematical demonstration that the $15 fee is excessive and arbitrary (R. 83), failed to take into consideration the services of all the highway patrol officers on the routes taken by caravans in the enforcement of the Vehicle Code as to such caravans, but merely calculated the reasonableness of the fee on the additional cost to the state by way of salaries paid for the additional help employed by reason of caravanning.

Appellee appears to contend that since Chapter 402 in itself contains no regulatory provisions except the provision in section 2 requiring that a space of 150 feet be maintained between vehicles or groups of vehicles, it can be regarded as a regulatory measure only with respect to such spacing provision, and that the cost of regulation must be limited to that one provision only. This contention is easily answered. In the first place, issuing the permit and keeping a record of the cars caravanned into the state are valuable regulatory measures, as shown by the evidence (R. 59). In the second place, while Chapter 402 defines the class and requires payment of a regulatory fee, the permissible cost of regulation is not limited to the cost of enforcing the regulatory provisions found in the act itself but extends to the cost of enforcing any and all regulatory statutes of the state which are applicable to the class defined in Chapter 402. *Gregg Dyeing Co.* vs. *Query,* 286 U. S. 472. Such applicable laws are found in the California Vehicle Code (Appendix B). By section 135 (a) thereof the members of the California Highway Patrol have the primary duty to enforce "the provisions of this code and of any and all other acts respecting the use or operation of vehicles upon public highways."

In addition to these elements, the state can charge for the wear and tear upon its roads occasioned by the operation of caravans, the movement

of the 60 to 70 per cent of tandem-towing hook-ups in appellee's caravans and other elements as discussed in *Morf* vs. *Bingaman, supra.* The state can require a fee for the privilege of using its highways for the conduct of business thereon. *Clark* vs. *Poor,* 274 U. S. 554; *Interstate Busses Corporation* vs. *Blodgett,* 276 U. S. 245; *Hicklin* vs. *Coney,* 290 U. S. 169; *Aero Mayflower Transit Co.* vs. *Georgia Public Service Commission,* 295 U. S. 285; *Hodge Drive-it-Yourself Co.* vs. *Cincinnati,* 284 U. S. 335; *Huse* vs. *Glover,* 119 U. S. 543; *Transportation Co.* vs. *Parkersburg,* 107 U. S. 691; *Lindsay and Phelps Co.* vs. *Mullen,* 176 U. S. 126; *Postal Telegraph Cable Co.* vs. *Richmond,* 249 U. S. 252; *Hendrick* vs. *Maryland,* 235 U. S. 610; *Kane* vs. *New Jersey,* 242 U. S. 160.

It is submitted that the record not only shows that appellee has failed to sustain the burden of proving the fee is excessive but shows affirmatively that the fee is not excessive. Another of the district court's findings may well be discussed at this point. The district court found as a fact:

> "Although plaintiff's business is large and lucrative, he operates upon a small margin of profit, and the fifteen dollar permit fee for each automobile he brings into California would practically absorb his net profit and would ruin his business, and a large part of the used car business in California." (Last sentence of 19th finding, R. 40.)

The only evidence on which the court based the foregoing is appellee's testimony as to the amount of his profit per car (R. 61).

Obviously, such a finding and the testimony upon which it is premised are not, of themselves, sufficient to warrant a conclusion that the fee is unconstitutionally excessive. *A. Magnano Co.* vs. *Hamilton,* 292 U. S. 40, at 47; *New Mexico, ex rel. McLean* vs, *Denver & Rio Grande R. R. Co.,* 203 U. S. 38, at 55. The mere fact that appellee can not continue to do business at a profit, after paying the fee, has no bearing on the question whether the fee is unconstitutionally excessive. (See cases last above cited.)

But we do not rest on that; rather, we submit that the court's finding is utterly wrong. In following the above conclusion based on appellee's testimony as to his margin of profit the court overlooked the plain and undisputed facts which demanded a contrary conclusion. Appellee testified that out of 3000 used cars he purchased in 1935, only fifty were bought in California (R. 63) and that:

> "The reason for my business is that dealers demand used cars and they come to me to get them because I have available cars, and they cannot get them in any other way. *If the used car industry is to exist they must get used cars from without the state of California.* There are not enough used cars in the state to meet the demand therefor." (R. 63.)

Now it is obvious from that state of facts that the $15 license fee could be added to the retail price and passed on to the purchaser, leaving appellee's margin of profit intact. There are no used cars on the market to compete with the used cars brought in from without the state. With demand and source of supply in such relation, the addition of $15 uniformly to the retail purchase price of used cars throughout the state would not stop buying any more than do sales taxes.

III

THE PROVISION IN SECTION 1 OF CHAPTER 402, THAT THE INCLUDED CLASS SHALL BE SUBJECT TO ALL OF THE LAWS RELATIVE TO THE TRANSPORTATION OF PROPERTY FOR HIRE BY MOTOR VEHICLE, DOES NOT VIOLATE THE 14TH AMENDMENT, EITHER IN IMPOSING UNCONSTITUTIONAL RESTRICTIONS UPON APPELLEE OR MAKING HIM ASSUME THE STATUS OF COMMON CARRIER AGAINST HIS WILL

In his bill of complaint appellee alleged (R. 8), that his constitutional rights guaranteed by the Fourteenth Amendment are impaired by the last sentence of section 1 of Chapter 402, which is:

> "The caravaning of motor vehicles as herein defined shall be considered as the transportation of property for hire by motor vehicle and shall be subject to all the laws of this State relative to the transportation of property for

hire by motor vehicle upon the public highways of this State."

The district court held against appellee on this contention. In its opinion it states (R. 82–83):

> "Although there is language in the act that might seem to require it, we think no pains need be taken to discuss in full the claim of plaintiff that he need pay a $25.00 fee (it has not been demanded) before applying for the special permit hereinbefore mentioned nor that he is compelled against his will and against the facts obtaining, to assume that status of a common carrier or a carrier for hire (California Carriers' Act). The so-called Caravan Act itself excludes such fee and if the law attempts to fix upon plaintiff a status not justified by the facts, it goes beyond the power of the legislature and is to that extent void as to him. *Frost Trucking Co.* vs. *R. R. Comm.,* 271 U. S. 583. It does not affect the other part of the statute, however, and is severable. For the theory of levying tax on vehicles using highways see *Interstate Transit Inc.* v. *Lindsey,* 283 U. S. 183; *Mallory* v. *Alabama,* 296 U. S. 261; *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245.
>
> "We have examined the California Carriers' Act (C. 223, Stat. 1935) and find that it does not affect plaintiff in any but in the most incidental and inconsequential manner, if at all."

The opinion determines what the district court decided in entering its decree, *Corcoran* vs. *Chesapeake and Ohio Canal Company,* 94 U. S. 741, *Phelps* vs. *Harris,* 101 U. S. 370, particularly where

the court's conclusions of law and decree, as here, are in general terms (R. 44-45).

The district court made no findings of fact that appellants or other state officers have taken any action, or made any demand, unconstitutional or otherwise, against appellee with respect to this portion of the statute, as, indeed, they have not. Appellants' joint return and answer disavows any attempt to collect any other fees from appellee except the $15 fee required by Chapter 402 or to impose any requirements upon appellee of which he complains in this respect (R. 15, 16, Pars. IV, VIII). The reason is, as the district court said, the California Highway Carriers' Act (Appendix D) does not affect appellant "in any but in the most incidental and inconsequential manner, if at all." That is, even if, as provided by section 1 of Chapter 402, appellee is subject to all the laws relative to the transportation of property for hire by motor vehicle, that provision is of no effect whatsoever unless there are laws relative to the transportation of property for hire by motor vehicle which can be applied, as a practical matter, to one hauling his own property, like appellee.

The California Highway Carriers' Act does not contemplate the application of its provisions to persons moving their own property; by the last words of section 1 (f) it does not apply to "persons hauling their own products." The only provisions it contains which can possibly apply to appellee are

the requirement of a permit (which the return and answer states will be granted to appellee without cost upon request, R. 16), and the *liability* insurance requirement which can validly be imposed upon appellee, *Hodge Drive-it-Yourself Co.* vs. *Cincinnati,* 284 U. S. 335, *Continental Baking Co.* vs. *Woodring,* 286 U. S. 352. As the California Highway Carriers' Act plainly applies to him in no other particulars, appellee can not claim that his rights are invaded by the application of other provisions to him unless it is made to appear that the state's officers are threatening to require his compliance with such nonapplicable provisions. *Continental Baking Co.* vs. *Woodring, supra; Hicklin* vs. *Coney,* 290 U. S. 169; *Clark* vs. *Poor,* 274 U. S. 554; *Stephenson* vs. *Binford,* 287 U. S. 251.

The above section can not by any construction be said to require appellee to become a *common* carrier, which was condemned in *Frost Trucking Co.* vs. *Railroad Commission,* 271 U. S. 583. It does not even contemplate making him a carrier for hire of any species, but simply subjects him to such of the provisions of the California Highway Carriers' Act (Appendix D) as are applicable to him. (*Continental Baking Co.* vs. *Woodring, supra.*)

CONCLUSION

For all of the foregoing reasons, which are summarized in the subject index, and in the summary of argument on page 24 hereof, it is respectfully submitted that the act here in question, Chapter 402, Statutes of 1935 of California, should be declared constitutional by this court, and that the decree of the district court should be reversed and the injunction against the enforcement of this act dissolved. We believe this result is required by settled principles of law announced by the decisions of this court, which we have cited.

Respectfully submitted.

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APPENDIX A

"THE CARAVAN ACT"

CHAPTER 402, STATUTES OF 1935 OF CALIFORNIA
(Page 1453)

An act to regulate the caravaning of motor vehicles upon the public highways of this State, defining the term "caravaning" and providing for the licensing of motor vehicles in caravan and imposing penalties for violations thereof.

(Approved by the Governor July 6, 1935. In effect September 15, 1935.)

The people of the State of California do enact as follows:

SECTION 1. The term "caravaning" as used in this act shall mean the transportation from without the State of any motor vehicle operated on its own wheels, or in tow of another motor vehicle, for the purpose of selling or offering the same for sale to or by any agent, dealer, manufacturers' representative, purchaser or prospective purchaser, whether such agent, dealer, manufacturers' representative, purchaser or prospective purchaser may be located within or without this State. The caravaning of motor vehicles as herein defined shall be considered as the transportation of property for hire by motor vehicle and shall be subject to all the laws of this State relative to the transportation of property for hire by motor vehicle upon the public highways of this State.

SEC. 2. No person, firm or corporation, shall use any highway in this State for caravaning motor vehicles unless and until there shall first have been secured from the Motor Vehicle Department of the State of California a special permit as to each vehicle so caravaned, for use of the highways of this State in caravaning such vehicle, which permit shall be displayed by posting the same upon the windshield of such vehicle or in other prominent

place thereon where it may be readily legible. It shall be unlawful to operate three or more vehicles or groups of vehicles in caravan unless a space of at least one hundred fifty feet shall at all times be maintained between each vehicle or group of vehicles being so caravaned.

SEC. 3. As a condition precedent to the issuance of any special permit provided for in the previous section of this act the Motor Vehicle Department of the State of California shall charge and collect a fee of fifteen dollars for each motor vehicle for which a caravan permit may be issued, whether such vehicle be operated under its own power or in tow of another motor vehicle; provided, however, that no such permit shall be issued by said Motor Vehicle Department unless and until the applicant therefor shall have produced evidence to the satisfaction of said Motor Vehicle Department that all of the laws of this State relating to the transportation of property upon the public highways therefor for hire shall have been complied with.

SEC. 4. No permit issued under this act for caravaning motor vehicles or vehicles shall be transferable either as between persons or as to the vehicle for which it is issued, and shall only be valid for the trip or trips to be specified in said permit, and in no event shall such permit be valid for a period of more than ninety days after it shall have been issued. Such permit shall contain such information and be in such form and shall be issued under such rules and regulations as may be prescribed by said Motor Vehicle Department. Such permit shall be conditioned upon the permitee complying with all laws of the State of California and the United States.

SEC. 5. The fee paid for any caravaning permit issued under this act shall be in lieu of all other registration fees and license fees for the use of public highways in this State by motor vehicle during the period that such motor vehicle may be operated under and in accordance with such permit upon the public highways in this State; provided, however, that nothing in this section shall exempt the owner or operator of such vehicle from compliance, except with respect to fees or license charges, with all laws of this State now or hereafter adopted, relating to the transportation of property for hire.

SEC. 6. All fees from the issuance of permits collected by the Motor Vehicle Department under this act shall be paid into the general fund in the State treasury.

Said department shall file with the Controller on or before February first and August first of each year a detailed account of the receipts of said Department from this source for the six months next preceding. The moneys so derived by the State are intended to reimburse the State treasury for the added expense which the State may incur in the administration and enforcement of this act and the added expense of policing the highways over which such caravaning may be conducted, so as to provide for the safety of traffic on such highways where caravaning is being conducted.

SEC. 7. Violation of the provisions of section 2 or of section 4 of this act is a misdemeanor punishable by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

APPENDIX B

PARTS OF THE "VEHICLE CODE" OF CALIFORNIA

Chapter 27, Statutes of 1935 of California, as amended by chapters 154, 156, 171, 332, 376, 384, 390, 508, 524, 527, 546, 570, 589, 590, 591, 592, 605, 671, 713, 714, 764, 765, 778, 783, 808, and 847, Statutes of 1935 of California.

101. Department Created. A department of the government of the State of California to be known as the Department of Motor Vehicles is hereby created.

105. Office of Director Created. The department shall be under the control of a civil executive officer to be known as the Director of Motor Vehicles, which office is hereby created.

108. Organization of Department. The director with the approval of the Governor shall organize the department in such manner as he may deem necessary properly to segregate and conduct the work of the department. The work of the department is hereby divided into at least two divisions, to be known respectively as the Division of Registration and the Division of Enforcement, to be known as the California Highway Patrol.

109. Office of Registrar of Vehicles Created. The Division of Registration shall be under the control of a civil executive officer to be known as the Registrar of Vehicles, which office is hereby created.

111. Office of Chief of California Highway Patrol Created. The California Highway Patrol shall be under the control of a civil executive officer to be known as the Chief of the California Highway Patrol, which office is hereby created. The Chief of the California Highway Patrol shall be appointed by the director subject to the approval of the Gov-

ernor, pursuant to the provisions of Article XXIV of the State Constitution, and shall receive an annual salary of seven thousand two hundred dollars. The Chief of the California Highway Patrol shall execute and deliver, as provided by law, an official bond in the sum of twenty-five thousand dollars.

135. Police Authority of Members of the California Highway Patrol. All members of the California Highway Patrol shall have the power:

(a) Of peace officers provided that the primary duty of the California Highway Patrol shall be the enforcement of the provisions of this code and of any and all other acts respecting the use or operation of vehicles upon public highways, and the members thereof shall not act as peace officers in enforcing any other law except

(1) when in pursuit of any offender or suspected offender,

(2) to make arrests for crimes committed in their presence or upon any highway.

(b) At all times to direct all traffic in conformance with the provisions of law, and in the event of a fire or other emergency or to expedite traffic or to insure safety to direct traffic as conditions may require notwithstanding the provisions of this code.

(c) When on duty, upon reasonable belief that any vehicle is being operated in violation of any provision of this code, to require the driver thereof to stop and submit to an inspection of such vehicle, the equipment, license plates and registration card thereon or to a test of the light or brake equipment upon such vehicle.

(d) To inspect any vehicle of a type required to be registered hereunder on a highway or in any garage or repair shop for the purpose of locating

stolen vehicles and investigating the title and registration thereof.

(e) To serve all warrants relating to the enforcement of this code.

215. Registration of Foreign Vehicle Used Commercially. A nonresident owner of a foreign vehicle of a type subject to registration hereunder which is used within this State for the transportation of persons or property for compensation or profit shall register such vehicle as provided in Chapter 1 of this division and the same fees shall be collected as upon the registration of a like vehicle owned by a resident of this State.

216. Nonresidents Conducting Business in this State. Every nonresident, including any foreign corporation, carrying on business within this State and owning and regularly operating in such business any vehicle of a type subject to registration hereunder shall register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this State.

250. Unlawful to Drive Unless Licensed. (a) It is a misdemeanor for any person to drive a motor vehicle upon a highway unless he then holds a valid operator's or chauffeur's license issued hereunder, except such persons as are expressly exempted under this code.

(b) It is a misdemeanor for any person to drive a motor vehicle upon a highway as a chauffeur unless he then holds a chauffeur's license duly issued hereunder, except such persons as are expressly exempted under this code.

251. Certain Persons Exempt. (a) No person in the naval or military service of the United

States, while acting as chauffeur in such service, need obtain a chauffeur's license.

(b) No person while driving or operating implements of husbandry incidentally operated or moved over a highway, need obtain an operator's or chauffeur's license.

252. When Nonresident Exempt. (a) A nonresident over the age of twenty-one years having in his immediate possession a valid operator's license issued to him in his home State or country may operate a motor vehicle in this State as an operator only for not to exceed one year without obtaining a license hereunder.

(b) A nonresident over the age of twenty-one years having in his immediate possession a valid chauffeur's license issued to him in his home State or country may operate a motor vehicle in this State without obtaining a license hereunder, but such nonresident must be licensed as a chauffeur under this code before accepting employment as a chauffeur from a resident of this State.

(c) A nonresident over the age of twenty-one years whose home State or country does not require the licensing of operators or chauffeurs may operate a foreign vehicle owned by him for not to exceed thirty days upon display of a valid nonresident permit issued under the provisions of this code without obtaining a license hereunder.

DIVISION VI. REGISTRATION AND LICENSE FEES

370. Registration Fees. A registration fee of three dollars shall be paid to the department for the registration of every vehicle of a type subject to registration, except for such thereof as are expressly

exempted under this code from the payment of registration fees.

372. Weight Fees for Commercial Vehicles. (a) In addition to the registration fees specified in section 370, there shall be paid fees for the registration of every vehicle of a type subject to registration designed, used or maintained for the transportation of persons for hire, compensation or profit or designed, used or maintained primarily for the transportation of property as set forth in this section.

(c) Any vehicle designed, used or maintained as described in subdivision (a) hereof other than an electric vehicle when equipped wholly with pneumatic tires shall pay fees for registration according to the following schedule:

Weight	*Fee*
(1) When unladen, 3000 pounds or more, but less than 6000 pounds	$8.00
(2) When unladen, 6000 pounds or more, but less than 10,000 pounds and limited hereunder to a gross weight of vehicle and load of not exceeding 22,000 pounds	$40.00
(3) When unladen, 10,000 pounds or more and limited hereunder to a gross weight of vehicle and load of not exceeding 22,000 pounds	$50.00
(4) When unladen, 6000 pounds or more and entitled hereunder to a gross weight of vehicle and load in excess of 22,000 pounds	$70.00

Chapter 6. Speed Laws.

510. Basic Speed Laws. No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the

traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.

511. Prima Facie Speed Limits. The speed of any vehicle upon a highway not in excess of the limits specified in this section is lawful unless clearly proved to be in violation of the basic rule declared in section 510 hereof.

The speed of any vehicle upon a highway in excess of any of the limits specified in this section is prima facie unlawful unless the defendant establishes by competent evidence that any said speed in excess of said limits did not constitute a violation of the basic rule declared in section 510 hereof at the time, place and under the conditions then existing.

The prima facie limits referred to above are as follows:

(a) Fifteen miles per hour:

(1) When passing a school building, or the grounds thereof, contiguous to the highway during school recess or while children are going to or leaving such school during opening or closing hours or while the playgrounds of any such school are in use by school children.

(2) When traversing a grade crossing of a steam, electric or street railway if during the last one hundred feet of the approach to such crossing the driver does not have a clear and unobstructed view of such crossing and of any traffic on such railway for a distance of four hundred feet in both directions along such railway.

(3) When approaching or upon a curve or any other part of a highway in the event the driver's view is obstructed within a distance of one hundred

feet along the highway in the direction in which such driver is proceeding.

(4) When traversing any intersection of highways if during the last one hundred feet of his approach to such intersection the driver does not have a clear and unobstructed view of such intersection and of any traffic upon all of the highways entering such intersection for a distance of one hundred feet along all such highways, except upon a through highway or at traffic-controlled intersections, in which event in a business or residence district the district speed shall apply and elsewhere the speed shall be thirty miles per hour.

(b) Twenty miles per hour:

(1) In any business district.

(2) When upon the ground of any public school, State university, State college, or State, county, or municipal institution or building.

(c) Twenty-five miles per hour in any residence district.

(d) Forty-five miles per hour under all other conditions.

514. Minimum Speed Law. No person shall drive upon a highway at such a slow speed as to impede or block the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or because upon a grade or when the vehicle is a motor truck or motor truck towing another vehicle necessarily or in compliance with law proceeding at reduced speed.

Chapter 7. Driving on Right Side of Roadway—Overtaking and Passing.

525. Drive On Right Side of Roadway. Upon all roadways of sufficient width a vehicle shall be driven

upon the right half of, and as close as practicable to the right-hand curb or edge of, such roadway, except as follows:

(a) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement.

(b) When placing a vehicle in a lawful position for, and when such vehicle is lawfully making, a left turn.

(c) When the right half of a roadway is closed to traffic while under construction or repair.

(d) Upon a roadway designated and signposted for one-way traffic or upon a roadway divided into three or more clearly marked lanes for traffic.

526. Driving on Roadways Laned for Traffic. Whenever any roadway has been divided into three or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

(a) A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

(b) Upon a roadway which is divided into three lanes a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle where the roadway ahead is clearly visible and such center lane is clear of traffic within a safe distance, or in preparation for a left turn or where such center lane is at the time allocated exclusively to traffic moving in the direction the vehicle is proceeding and is signed posted to give notice of such allocation.

531. Following Too Closely. (a) The driver of a motor vehicle shall not follow another vehicle more

closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon, and the condition of, the roadway.

(b) The driver of any motor truck or motor truck drawing another vehicle when traveling upon a roadway outside of a business or residence district shall not follow within three hundred feet of another motor truck or motor truck drawing another vehicle. The provisions of this subdivision shall not prevent overtaking and passing nor shall the same apply upon any lane especially designated for use by motor trucks. This subdivision shall not apply to motor vehicles drawing highway construction or maintenance equipment while being used in highway construction or maintenance work.

CHAPTER 13. STOPPING, STANDING OR PARKING.

582. Stopping, Standing or Parking Outside of Business or Residence Districts. Upon any highway outside of a business or residence district no person shall stop, park or leave standing any vehicle whether attended or unattended, upon the paved or improved or main traveled portion of the highway when it is practicable to stop, park or so leave such vehicle off such part or portion of said highway.

CHAPTER 2. REQUIRED LIGHTING EQUIPMENT.

618. When Vehicles Must Be Equipped. (a) Every vehicle upon a highway at any time from a half hour after sunset to a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible any person or vehicle on the highway at a distance of two hundred feet shall be equipped with lighted lamps and lighting devices as respectively provided in this chapter

for different classes of vehicles subject to the exceptions set forth in this chapter.

619. Headlamps on Motor Vehicles. Every motor vehicle other than a motorcycle, at the times specified in section 618 hereof, shall be equipped with two lighted headlamps, no more and no less, mounted on opposite sides of the front of said vehicle, and, except as to vehicles registered prior to January 1, 1930, they must be located directly above or in advance of the front axle of said vehicle. Said headlamps shall be located at a height measured from the center of the headlamps of not more than forty-two inches nor less than thirty inches above the level surface upon which said vehicle stands, except, if the said vehicle was registered prior to August 14, 1929, said headlamps may be located at a height so measured of not more than fifty-four inches above the level surface upon which such vehicle stands.

621. Rear Lamps and Reflectors. (a) Every motor vehicle and every vehicle which is being drawn at the end of a train of vehicles at the times specified in section 618 hereof shall be equipped with at least one or not to exceed two lighted rear lamps exhibiting red light plainly visible from a distance of 500 feet to the rear except that every vehicle or the vehicle at the end of a train of vehicles which vehicle or train of vehicles is subject to the special speed regulations in section 515 shall be equipped with two such lighted rear lamps which shall be mounted at the left and right side respectively on the rear of the vehicle.

679. Unlawful to Operate Vehicle Without Required Equipment or in Unsafe Condition. No person shall operate or move on any highway

any motor vehicle or any combination of vehicles unless said vehicle or combination of vehicles is equipped as required by this code and is in such safe mechanical condition as not to endanger the driver or other occupant or any person upon the highway.

680. Members of Highway Patrol May Inspect Vehicle and its Equipment. (a) Any member of the California Highway Patrol having reasonable cause to believe that any vehicle or combination of vehicles is not equipped as required by this code or is in such unsafe condition as to endanger the driver or other occupant or any person upon the highway, may require the driver thereof to stop and submit such vehicle or combination of vehicles to an inspection of the mechanical condition or equipment thereof and such test with reference thereto as may be appropriate.

APPENDIX C

PART OF "VEHICLE LICENSE FEE ACT"

Chapter 362, Statutes of 1935 of California. Effective September 15, 1935. Operative January 1, 1936.

SECTION 1. "Vehicle" as used herein means every vehicle subject to registration under the Vehicle Code.

"Department" means the Department of Motor Vehicles.

SEC. 2. A license fee is hereby imposed for the privilege of operating in this State any vehicle. The annual amount of such license fee shall be a sum equal to one and three-quarters per cent of the actual market value of such vehicle, as determined by the department. The department annually shall compile and publish a list showing the market val-

ues as determined by it of each class of vehicle subject to the license fee hereby imposed, such vehicles being classified by make, type and year of manufacture. The license fee imposed by this act shall not apply to any vehicle not subject to registration under the Vehicle Code, nor to any vehicle owned by the State, any political subdivision of the State, or any city, city and county, county, district or public corporation.

SEC. 5. The license fee imposed under this act is in addition to any and all licenses and taxes otherwise imposed, except that no tax according to value shall hereafter be levied or imposed upon any vehicle upon which is paid the license fee required by this act. Such vehicles are hereby exempted from all taxes, State, county or municipal, according to value levied for State or local purposes.

SEC. 6. Whenever any vehicle is operated upon any highway of this State without the license fee having first been paid as required by this act, such fee is delinquent.

APPENDIX D

"HIGHWAY CARRIERS' ACT."

An act regulating the use of public highways for commercial purposes by certain motor vehicles operated thereon for the transportation of property for compensation; preventing discriminations between various forms of transportation; conferring powers upon the Railroad Commission with respect to the transportation of property for compensation by said motor vehicles; providing penalties for the violation of this act, and repealing all acts inconsistent with the provisions of this act.

(Chapter 223, Statutes of 1935 of California.)

The use of the public highways for the transportation of property for compensation is a business

affected with a public interest and it is hereby declared that the purpose of this act is to preserve for the public the full benefit and use of public highways consistent with the needs of commerce without unnecessary congestion or wear and tear upon such highways; to secure to the people just and reasonable rates for transportation by carriers operating upon such highways; to secure full and unrestricted flow of traffic by motor carriers over such highways which will adequately meet reasonable public demands by providing for the regulation of rates of all transportation agencies so that adequate and dependable service by all necessary transportation agencies shall be maintained and the full use of the highways preserved to the public.

SECTION 1. (a) The term "corporation" when used in this act includes a corporation, a company, an association and a joint stock association.

(b) The term "person" when used in this act includes an individual, a firm or a copartnership.

(c) The term "public highway" when used in this act includes every public street, road or highway in this State.

(d) The term "Railroad Commission" when used in this act means the Railroad Commission of the State of California.

(e) The term "motor vehicle" when used in this act means every motor truck, tractor, or other self-propelled vehicle used for transportation of property over the public highways, otherwise than upon fixed rails or tracks, and any trailer, semitrailer, dolly or other vehicle drawn thereby.

(f) The term "highway carrier" when used in this act means every corporation or person, their lessees, trustees, receivers or trustees appointed by

any court whatsoever engaged in transportation of property for compensation or hire as a business over any public highway in this State by means of a motor vehicle or motor vehicles. However, it does not include carriers operating exclusively within the limits of a single incorporated city or city and county, nor does it include persons rendering casual transportation services as an accommodation, and not in the usual or ordinary course of business of such person, nor does it include persons hauling their own products.

(g) The term "highway common carrier" when used in this act means every highway carrier operating as a common carrier subject to regulations as such by the Railroad Commission under Chapter 213 of the Statutes of 1917, as amended.

(h) The term "radial highway common carrier" when used in this act means every highway carrier operating as a common carrier not heretofore subject to regulation as such by the Railroad Commission under Chapter 213 of the Statutes of 1917, as amended.

(i) The term "highway contract carrier" when used in this act means every highway carrier other than a highway common carrier as defined in subsection (g) and every radial highway common carrier as defined in subsection (h).

SEC. 2. No highway carrier other than a highway common carrier shall engage in the business of the transportation of property for compensation by motor vehicle over any public highway in this State, except in accordance with the provisions of this act, which the Legislature hereby declares to be enacted under the power of the State to regulate the use of public highways.

SEC. 3. Except as hereinafter provided, no highway carrier, other than a highway common carrier, shall engage in the business of transportation of property for compensation by motor vehicle on any public highway in this State without first having obtained from the Railroad Commission a permit authorizing such operation; provided, however, that any highway carrier subject to the provisions of this act, who is in business on the effective date of this act, shall file his application with the commission within thirty days after this act shall take effect. Any highway carrier desiring a permit to operate hereunder as a highway carrier other than a highway common carrier, shall file a petition therefor with the Railroad Commission. Such petition shall set forth the name and address of the applicant; the names and addresses of its officers, if any; full information concerning the financial condition and physical properties of applicant; and such other information necessary to the enforcement of this act, as the Railroad Commission may, by order, require. Upon compliance with this act a permit must be issued by the commission, but no such permit shall be granted to a foreign corporation. Pending the issuance of any permit by the commission, the continuance of such operation shall be lawful. Any operating permit not exercised for a period of one year shall lapse and terminate.

SEC. 4. No person or corporation shall be permitted by the Railroad Commission to engage, nor shall any person or corporation engage in the transportation of property on the public highway, both as a common carrier and as a highway contract carrier of the same commodities between the same points.

Any person or corporation who, prior to the effective date of this act, operated as both a common carrier and as a highway contract carrier, must, in order to continue operation after the effective date of this act, elect whether such person or corporation will continue to operate as a highway contract carrier, or as a common carrier of the same commodities between the same points.

SEC. 5. The Railroad Commission shall, in granting permits under the provisions of this act, require the highway carrier to procure, and continue in effect during the life of the permit, adequate protection, as required in section 6 hereof, against liability imposed by law upon such highway carrier for the payment of damages for personal bodily injuries (including death resulting therefrom) in the amount of not less than five thousand dollars on account of bodily injuries to, or death of, one person; and protection against a total liability of such highway carrier on account of bodily injuries to, or death of, more than one person, as a result of any one accident, in the amount of not less than ten thousand dollars; and protection in an amount of not less than five thousand dollars for one accident resulting in damage or destruction of property whether the property of one, or more than one claimant.

SEC. 6. The protection required under section 5 shall be evidenced by the deposit with the Railroad Commission, covering each vehicle used or to be used under the permit applied for, of a policy of public liability and property damage insurance, issued by a company licensed to write such insurance in the State of California; or of a bond of a surety company licensed to write surety bonds in the State of California; or of a personal bond, with such sureties

as the Railroad Commission shall find adequate to guarantee the protection prescribed in section 5 hereof; or it shall be evidenced by a trust fund in the amount of fifteen thousand dollars, to be held in trust by some institution or person acceptable to the Railroad Commission; or by a combination of any of or all of said methods in such manner that the aggregate of the protection or funds available therefor shall equal the principal sum of not less than fifteen thousand dollars, and such highway carrier shall have the option of the method to be used in obtaining such protection, and may change from one method to another, from time to time, with the consent of the Railroad Commission.

SEC. 7. The protection against liability as outlined in section 5 hereof must be continued in effect during the life of the permit, and the policy of insurance, surety bond or personal bond shall not be cancellable on less than ten (10) days written notice to the Railroad Commission. The Railroad Commission shall have power to establish such rules and regulations as may be necessary to carry out the provisions of sections 5 to 7, inclusive.

SEC. 8. Each highway carrier shall display on each vehicle operated by it, a distinctive license plate in the form to be prescribed by the Railroad Commission, showing the classification, as herein provided, to which such carrier belongs, but no such license plate shall be issued by the said commission until a permit under this act, or a certificate of public convenience and necessity as provided for under the provisions of Chapter 213 of the Statutes of 1917, as amended, has been issued to such carrier.

[Chapter 213, Statutes of 1917, as amended, was repealed by Chapter 664, Statutes of 1935. See page 207.]

SEC. 9. A fee of three dollars ($3.00) shall be paid to the Railroad Commission for filing each application for an operating permit. Each permittee shall also pay to the Railroad Commission on or before the first day of January of each year, a fee of one dollar ($1.00) for the reregistration of his permit. All moneys collected by the Railroad Commission under this act shall be deposited at least once a month into the State treasury, to the credit of the general fund, and a detailed statement thereof shall be transmitted to the State Controller.

SEC. 10. The Railroad Commission shall, upon complaint or upon its own initiative without complaint, establish or approve just, reasonable, and nondiscriminatory maximum or minimum or maximum and minimum rates to be charged by any highway carrier other than a highway common carrier, now subject to the jurisdiction of said commission under Chapter 213 of the Laws of 1917, and as amended, for the transportation of property and for accessorial service performed by said highway carrier.

In establishing or approving such rates the commission shall take into account and give due and reasonable consideration to the cost of all of the transportation services performed, including length of haul, any additional transportation service performed, or to be performed, to, from, or beyond the regularly established termini of common carriers or of any accessorial service and the value of the commodity transported and the value of the facility reasonably necessary to perform such transportation service.

In event the commission establishes minimum rates for transportation services by highway carriers, such rates shall not exceed the current rates of common carriers for the transportation of the same kind of property between the same points.

It shall be unlawful for any highway carrier to charge or collect any lesser rate than the minimum rate or greater rate than the maximum rate established by the commission under this section.

The commission shall make such rules and regulations as may be necessary to the application of the rates established or approved under the provisions of this act.

[Chapter 213, Statutes of 1917, as amended, was repealed by Chapter 664, Statutes of 1935. See page 207.]

SEC. 11. If any highway carrier other than a common carrier desires to perform any transportation or accessorial service at a lesser rate than the minimum rates so established, the Railroad Commission shall, upon finding that the proposed rate is reasonable authorize such rates less than the minimum rates established in accordance with the provisions of section 10 hereof.

SEC. 12. It shall be unlawful for any highway carrier or his agent, servant or employee, directly or indirectly, to offer, remit or give to any shipper or consignee, his agent, servant or employee directly or indirectly, any commission or other consideration to induce such person to deliver to such highway carrier property to be transported; and it likewise shall be unlawful for any shipper or consignee, his agent, servant or employee, to receive from such highway carrier, directly or indirectly,

any such commission or consideration as an inducement to secure the transportation of any such property.

SEC. 13. In all respects in which the Railroad Commission has power and authority under the Constitution of this State or this act, applications and complaints may be made and filed with the Railroad Commission, process issued, hearings held, opinions, orders and decisions made and filed, petitions for rehearing filed and acted upon, and petitions for writs of review or mandate filed with the Supreme Court of this State, considered and disposed of by said court, in regard to the matters provided for in this act, in the same manner, under the same conditions and subject to the same limitations and with the same effect specified in the Public Utilities Act, so far as applicable.

SEC. 14. Any person or any director, officer, agent or employee of a corporation who shall violate any of the provisions of this act or of any operating permit issued hereunder to any highway carrier, or any order, rule or regulation of said commission, shall be guilty of a misdemeanor and, upon conviction thereof, be fined not more than five hundred dollars or imprisoned in the county jail for not more than three months, or both. The operating permit, if any, shall, at the discretion of said commission, be subject to cancellation for such violation, and said commission shall thereupon require the removal from such vehicle operated thereunder of any distinctive symbols or license plates herein provided for, which may have been issued therefor.

SEC. 15. Any person or corporation who violates or fails to comply with any provision of this act,

or who fails, omits or neglects to obey, observe or comply wth any order, decision, rule, direction or requirement or any part or provision thereof, of the commission, is subject to a penalty of not more than five hundred dollars for each offense.

SEC. 16. Every violation of the provisions of this act or of any order, decision, decree, rule, direction, demand or requirement of the commission, or any part or portion thereof by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.

SEC. 17. In construing and enforcing the provisions of this act relating to penalties, the act, omission or failure of any officer, agent or employee of any person or corporation, acting within the scope of his official duties or employment, shall in every case be and be deemed to be the act, omission or failure of the employing person or corporation.

SEC. 18. Actions to recover penalties under this act shall be brought in the name of the people of the State of California, in the superior court of the county, or city and county, in which the cause or some part thereof arose, or in which the corporation complained of, if any, has its principal place of business, or in which the person, if any, complained of, resides. Such action shall be commenced and prosecuted to final judgment by the attorney of the commission. In any such action, all penalties incurred up to the time of commencing the same may be sued for and recovered. In all such actions, the procedure and rules of evidence shall be the same as in ordinary civil actions. All penalties recovered by the State in any such action, together

with the costs thereof, shall be paid into the State treasury to the credit of the general fund. Any such action may be compromised or discontinued on application of the commission upon such terms as the court may approve and order.

SEC. 19. All penalties accruing under this act shall be cumulative of each other, and a suit for the recovery of one penalty shall not be a bar to or affect the recovery of any other penalty or forfeiture or be a bar to any criminal prosecution against any person or corporation, or any officer, director, agent or employee thereof, or any other corporation or person or be a bar to the exercise by the commission of its power to punish for contempt.

SEC. 20. The provisions of this act shall not apply to:

(a) Transportation service all of which is rendered in territory within the exterior boundaries of an incorporated city, or city and county; provided that such territory shall include the area of any incorporated city situated wholly within such outside limits:

(b) The transportation of baggage and express when such transportation is incidental to that of passengers by passenger stage corporations as defined in section 2¼ of the Public Utilities Act.

SEC. 21. If any section, sentence, clause or part of this act, is for any reason held to be unconstitutional such decision shall not affect the remaining portions of this act. The Legislature hereby declares that it would have passed this act, and each section, sentence, clause, or part thereof, except as hereinbefore specifically provided, irrespective of the fact that one or more sections, sentences, clauses or parts be declared unconstitutional.

SEC. 22. Neither this act nor any provision hereof shall apply to or be construed as a regulation of commerce with foreign nations or among the several States, except in so far as the same may be permitted under the provisions of the Constitution and the acts of Congress of the United States.

SEC. 23. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

SEC. 24. This act shall be known as the "Highway Carriers' Act."

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CHARLES ELMORE CROPLEY
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 456

RAY INGELS, as Director of the Motor Vehicle Department of the State of California; HOWARD E. DEEMS, as Registrar of the Motor Vehicle Department of the State of California; JOHN C. CORBETT, FRED E. STEWART, R. E. COLLINS, RAY EDGAR and RAY L. RILEY, as members of the State Board of Equalization and constituting said board in the State of California; and E. SEYMOUR,

Appellants,

vs.

HOWARD MORF, doing business under the firm name and style of PACIFIC WHOLESALE AUTOMOBILE COMPANY; UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation; and CONTINENTAL CASUALTY COMPANY, a corporation,

Appellees.

REPLY BRIEF OF APPELLANTS
With Appendix

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REPLY BRIEF OF APPELLANTS

With Appendix

REASONS FOR FILING REPLY BRIEF

1.

After appellants' original brief was filed, the Supreme Court of the State of Idaho (the highest court

of the state) held on January 18, 1935, that the Idaho Caravan Act does not violate the United States Constitution. The Idaho Act is similar to the California Act, and Sections 1 and 2 of both acts are identical except for a few immaterial differences in phraseology. As the Idaho court's opinion has not been published yet, a copy of it is printed at the end of this reply brief as Appendix A, and a copy of the Idaho Caravan Act (Chapter 2, Extraordinary Session Laws of 1935) as Appendix B.

2.

It has always been appellants' understanding that an appellee's brief should point out specifically any claimed inaccuracies and omissions in the statement of facts in the appellants' brief in order that the court may have before it the precise claims of the parties with reference to the facts.

Appellee has not done this but has only made his own statement of the facts without, except in a few instances, pointing out wherein it differs from appellants' statement. It is respectfully submitted that appellee's statement of facts throughout his brief abounds in inaccuracies and omissions. Leaving the briefs in that situation would impose on the Court the necessity of finding out for itself, by a comparison of the statements, the parties' claims as to the record.

For the above and other reasons which will appear herein appellants believe they can be of service to the Court by filing a short reply brief.

APPELLEE'S STATEMENT OF THE FACTS

In the fourth paragraph on page 4 of appellee's brief appears the statement that a certain car "was driven singly, not in company with any other car, and not in caravan, procession or fleet." The same statement appears in the second paragraph on page 5 with reference to two cars joined in tandem.

There is absolutely nothing in the record that supports these statements. That these facts may be wholly immaterial is not important; it should first be determined what the true record facts are before proceeding to decide their materiality. These statements are evidently based upon the record furnished by Appendix A of appellee's motion for Diminution of the Record. Appendix A also appears on page 87 of appellee's brief.

The matter we are here objecting to cannot be supplied by Appendix A. It will be noticed that Appendix A recites that "Appellee's counsel commenced proof of the facts alleged in paragraphs VII and VIII of appellee's Bill," and then it appears that the very most that happened in any event was that appellants admitted at the trial the truth of the allegations of those paragraphs. The record can contain nothing more than appears in such paragraphs. And those two paragraphs of appellee's Bill (R. 4-6) do not contain any statement or even an inference that the cars in question were being driven "not in company with any other car, and not in caravan, procession or fleet." Therefore appellee's statements to that effect on pages 4 and 5 of his brief are absolutely unwarranted.

In the first and third paragraphs on page 5 and at

the top of page 6 of appellee's brief are statements to the effect that 30 to 40 per cent of the cars appellee brings into California are driven "alone, as a single unit, without having a car attached thereto, and not in company with any other cars coming into California." This is plainly not correct, as is pointed out at length in pages 45 to 49 of appellants' brief, where the evidence bearing on this point is fully analyzed. *And appellants' analysis is not in any way attacked or questioned by appellee.* Appellee makes this statement at several places in his brief without attempting to support it by an examination of the evidence, and without disputing the analysis of the evidence on pages 45 to 49 of appellants' brief. The evidence is, as we there point out, that according to appellee's own testimony the single cars appellee brings in are in the fleets scattered among the cars joined in two-car, tandem hook-ups. Such two-car hook-ups comprise 60 to 70 per cent of all of the cars appellee brings in, and the several single cars in each fleet (the fleets averaging 12 cars) make up the 30 to 40 per cent of the single cars appellee brings into the State of California.

The second sentence on page 7 of appellee's brief that "there is no particular hazard in driving an automobile with another towed to it," while a summary of what appellee testified on the subject, is not a true summary of the entire testimony on this matter. In appellants' brief (pp. 17-18) we stated in full appellee's conclusions that towing is not hazardous. However, there is much testimony in the record showing beyond any question the hazards and extra burdens imposed upon the highways by the towing

of caravan cars. (See pages 13-14 of appellants' original brief.)

Appellee's summaries of the testimony of appellants' witnesses, Dillon, Walsh and Cato, are very obviously incomplete. A few scattered statements have been restated in the form of conclusions without relation to their context and without even trying to present a complete and accurate statement of what these witnesses said. We refer the court to appellants' statement of the evidence (pp. 10-18 of appellants' original brief) and the Record, pp. 46-56.

It should be stated that the fifth word in the fourth line on page 8 of appellee's brief should not be "noticed" but should be "counted" (R. 49).

On page 9 of appellee's brief it is said: "There is caravaning of cars on their own wheels for the purpose of sale, intrastate within the State of California." But it should also be stated that the only evidence as to the source of any particular cars so moved is that they are cars recently caravaned into California and on which the caravan fee has been paid (R. 61). Rightly, then, the caravan law exempts such second and intrastate movement of such cars from a second imposition of the fee, by providing that it shall apply only to the incoming movement and not to later movements. The dissenting opinion below points this out clearly (R. 95). Also the further statement should be made that the intrastate movement is "small" and "what little there is of it" is of single cars not in fleets or groups (R. 54, 58).

The rest of page 9 of appellee's brief presents an utterly incorrect statement of the record because it

gives only brief portions detached from the rest of the witnesses' testimony. However, the true record can easily be ascertained by referring briefly to the Record page numbers supplied in appellee's statement, hence this reply brief will not be prolonged by repeating the Record.

In pages 10 to 13 of his brief, appellee sets out his idea of the issues in his summary of the argument. It will be noted that on these pages there appear again in several places the statement not supported by the record, as previously pointed out in this reply brief, that certain specifically described cars were moved into California not in company with any other car or cars.

For a statement of the issues, we refer the Court to the subject index at the commencement of appellants' original brief and to the summary of argument on pages 24 to 26 of such brief.

APPELLEE'S ARGUMENT—POINT I

Appellee analyzes the District Court's findings of fact at some length. It is apparent that appellee is unable to distinguish between conclusions of law and findings of fact. This is so plain as to require no further statement.

We think no purpose can be served by a detailed examination of appellee's theories as to the Court's findings, except in a few instances. On pages 17 to 19 of his brief, appellee goes into the question of fact as to the number of single cars not in caravan that he brings into the State. A sufficient answer to this question of fact is contained on pages 45 to 49 of appellants' original brief; and it should be noted

that although on pages 17 to 19 of appellee's brief he devotes considerable argument to this question, he does not in any way attempt to show that appellants' analysis is erroneous.

Appellants' statement which is attacked by appellee at the top of page 20 of appellee's brief, is based on the testimony of highway patrolman Walsh at the top of page 49, Record, in which Walsh said that the conditions he testified to were typical of the caravan movement and that he had only seen one caravan in a year and a half which was free from law violations.

Appellee's discussion of the costs of enforcement on pages 25 to 27 of his brief, overlooks many factors. The testimony of appellants' witnesses Cato and Bevins shows that many additional men other than those referred to in appellee's analysis are employed in administering and enforcing the Caravan Act. It requires the services of all highway patrolmen on the main highways of the State where caravaning is conducted. It is also to be noted that appellee did not attempt to cross examine the witness Bevins, or attempt in any way to contradict or discredit his testimony that the administration expense of issuing caravan permits is about $5.00 for each permit. The time for appellee to have examined and challenged this statement of a high state official of California was during the trial of the case.

On page 28 of his brief, appellee discusses finding of fact No. 25 (R. 41). This finding of fact is fully answered and shown to be without foundation on pages 45 to 49 of appellants' original brief, and as has been previously pointed out herein, ap-

pellee has made no answer whatsoever to that part of appellants' brief.

Also on page 28, appellee discusses finding of fact No. 26. To appellee's argument there are several answers. There is not one word of evidence, and appellee does not attempt to point to any, that there is any intrastate commerce of automobiles in twos coupled, or in fleets, for purpose of sale. The undisputed evidence is that the small number of vehicles moved intrastate on their own wheels for purpose of sale are moved singly, not in twos coupled, and not in caravan (R. 54, 57). An answer that goes to the fundamental purpose of appellee's argument is this: The only evidence as to the intrastate movement of any particular cars for purpose of sale is that testified to by appellee as to the movement of the cars that he brings into the State after they have reached his place of business and have come to rest in the State. This is an eloquent and decisive point in showing the propriety of requiring payment of the caravan fee only for the movement from without the State. If the fee were also required for the cars which appellee brings into the State and which move intrastate for purpose of sale on their own wheels after they have come to rest at Los Angeles, such cars would be subject to an additional $15.00 fee. Appellee's argument on pages 28 and 29 of his brief as to finding of fact No. 26, is a perfect justification of that feature of the Caravan Act.

APPELLEE'S POINT II COMMENCING ON PAGE 33 OF HIS BRIEF

Appellee's argument on pages 33 to 50 of his brief is completely answered in appellants' original brief,

particularly on pages 27 to 60 thereof. There are a few points in the above designated pages of appellee's brief, however, to which we desire briefly to call the Court's attention. At the top of page 35, appellee states that he is required upon arrival at the California boundary, to pay other registration and license fees in addition to the caravan fee before being permitted to operate his vehicles upon the highways of California. Appellee made no such complaint in his bill of complaint, and it is too plain for argument that under the law he can move a vehicle from the border to any place in the State or through the State by paying only the caravan fee. See Section 5 of the Caravan Act. It has been our understanding throughout this case that appellee could so move his cars by paying only the caravan fee, and appellee has never complained that he was being compelled to pay other registration or license fees for the caravan movement until such statement appeared in his brief. Admittedly, after the caravan journey has ceased and the car has come to rest in the State, the regular State registration and license fees must be paid when the car is sold. As a matter of fact, the statement at the top of page 36 of appellee's brief is a contradiction of the statement at the top of page 35 of his brief.

At the bottom of page 37 and at the top of page 38 of his brief, appellee erroneously states that appellants state on page 38 of their brief "that the validity of the tax with respect to the movement of single cars from without the State, upon their own wheels, for the purpose of sale, constitutes one of the principal issues of this case." Appellants' statement is that the inclusion of all cars, whether moved

singly or otherwise, within the terms of the Caravan Act, does not invalidate the Act, for the various reasons stated, commencing on page 27 of their brief.

The first paragraph on page 40 of appellee's brief introduces some entirely new testimony into the case. The place for appellee to have fully explained his testimony on this point was while on the witness stand. Certainly the Court cannot take judicial notice of the facts which appellee claims. Common knowledge, if we are going to indulge in this procedure for supplying facts, could be extended to include judicial notice that new car dealers sell their used cars, taken in trade on new cars, at their place of business where such transactions are consummated without any interstate movement.

On page 41 of his brief, appellee again proves the propriety of the provisions of the Caravan Act confining the fee exaction to the movement of cars from without the State.

On page 45 of his brief, appellee wants the Court to take judicial notice of something which is obviously not of common knowledge today, namely, that there are "over a half million house car trailers travelling over the highways of this nation." If complaints are made to the legislative bodies of the various states as to traffic hazard caused by the movement of house car trailers on the highways, undoubtedly appropriate legislative action will be taken as it has as to caravaning of motor vehicles. The same thing is to be said of appellee's argument on page 46. The classification made by the Caravan Act, however, is not to be nullified because these other new problems of highway regulation are also

arising *Kentucky Consol. Coke Co. vs. Taylor*, 234 U. S. 224.

The italicized quotation on page 47 of appellee's brief is directly contradicted by the only specific evidence in the Record on the exact point, in which it is made plain that the conditions of law violation and highway hazard are the rule in the caravan movement and that in a year and a half a highway patrolman had seen only one caravan free from law violation (R. 49).

APPELLEE'S POINT III COMMENCING ON PAGE 50 OF HIS BRIEF

This point is fully answered on pages 61 to 81 of appellants' brief, but there are a few statements in appellee's brief to which we wish to direct the Court's attention.

From the indignant tone in which he commences his argument at this point, it would appear that appellee forgets that he is using the public highways in the conduct of a private commercial business. Under appellee's own theory of the facts at least two-thirds of such business is conducted in the manner held to be subject to separate classification in *Moor vs. Bingaman*, 298 U. S. 407. And under a proper understanding of the facts and the fundamental reason for the caravaning business and the way that it is carried on, all of appellee's business is plainly subject to separate classification (Appellants' original brief, pages 27 to 61).

On page 51 of his brief, appellee recites parts of the testimony of appellants' witnesses Martland and Bevins. The entire answer to that is to read all of the testimony of such witnesses (R. 56-59). The

testimony of these witnesses and of Cato (R. 52-56), Dillon (R. 51), and Walsh (R. 46-51), clearly demonstrates that the legislature had before it the evidence as to the practices and hazards of caravaning. Cato and Martland testified as to these hazards before the legislative committee (R. 55, last sentence of second paragraph; R. 57).

But appellee overlooks the long established principle stated in *Stephenson* vs. *Binford*, 287 U. S. 251, with reference to another highway act:

> "It is enough to support its validity that, plainly, one of its aims is to conserve the highways. If the legislature had other or additional purposes, which, when considered apart, it had no constitutional power to make effective, that would not have the result of making the act invalid."

On pages 55 and 57 of his brief, appellee makes the wholly unwarranted assertions that in the District Court appellants attempted to justify the $15.00 fee solely as a police power regulatory fee and not as a charge for the use of the State's highways. It is difficult to understand why appellee makes this claim in view of the plain record. Thus, in Paragraphs VI and XIV of appellants' answer (R. 15, 19) appellants stated that the fee is a police power regulatory fee and also a charge exacted as compensation for the privilege of using the State's highways. Appellants have taken this position throughout the case. The District Court recognized that appellants pressed this claim as it stated in its opinion (R. 84, top of page) "the Deputy Attorney General argues that the highways belong to the people and that

their use for commercial purposes can be charged for * * *."

On page 56, appellee misquotes the Caravan Act. The Act provides in Section 5 that the caravan permit fee "shall be in lieu of all other registration fees *and license fees* for the use of public highways." The italicized words were omitted by appellee.

It is apparent in reading pages 57 to 69 of appellee's brief that appellee completely misunderstands the principles enunciated in *Morf* vs. *Bingaman*, 298 U. S. 407, and *Interstate Transit* vs. *Lindsey*, 283 U. S. 183. In *Morf* vs. *Bingaman, supra*, it was held that the use made of the fees obtained from a motor vehicle license act is immaterial in deciding whether the act requires a license for the privilege of using the highways, if the act contains any terms which show that the fee is so required. Thus, in that case it was held that the fee was exacted as a charge for the privilege of using the State's highways because the Act there in question made payment of the fee a condition precedent to the use of the highways. Chapter 402, with which we are here concerned, also requires payment of the fee as a condition precedent to the use of the State's highways. The New Mexico Act and the California Act are precisely alike in that respect. The reason the license fee was held invalid in *Interstate Transit* vs. *Lindsey, supra*, was because the statute there considered did not contain any feature which identified the fee as a charge for the privilege of using the highways. Payment of the fee was not required as a condition precedent to the use of the highways by the statute considered in that case. As this Court pointed out in both *Morf* vs. *Bingaman, supra*, and *Interstate Transit* vs. *Lind-*

sey, supra, the use of the fees collected for highway construction and maintenance is important only where there is no other feature in the Act showing that the fee is levied as a charge for the privilege of using the highways.

Consequently, in this case the point that the fees required by the Caravan Act are paid into the State general fund is of no importance because the Caravan Act expressly identifies the charge as one for the privilege of using the highways by making payment of the fee a condition precedent to the use of the highways. A reading of *Interstate Transit* vs. *Lindsey, supra*, will show that if the Act there in question had made payment of the fee a condition precedent to the use of the highways the Act would have been sustained as valid. The reason for the Court's discussion of the various features of the law in that case was to point out that the Act contained no feature showing that the fee was a charge for the privilege of using the highways.

APPELLEE'S POINTS IV, V, AND VI

In his point IV, commencing on page 69, appellee misunderstands appellants' argument, but it is evident by the argument appellee there makes that he has abandoned his contention which appellants answer in their original brief commencing on page 81.

In his point V, commencing on page 71 of his brief, appellee's reasoning is patently erroneous. At the bottom of page 71 he makes a statement obviously incorrect which we have heretofore answered in this reply brief.

At the bottom of page 72 is another erroneous

statement. The Act by its specific terms makes payment of the fee a condition precedent to the use of the highways.

Commencing on page 73 of his brief, under point VI, appellee discusses certain authorities, which he clearly misunderstands. On pages 74 and 75 he quotes from *Interstate Transit* vs. *Lindsey, supra* (283 U. S. 183). The part quoted on page 75 is devoted to a discussion of *one* of the possible indices of a charge required for the privilege of using the highways. The Court found that the license fee there in question did not meet that one test, namely, proportion of the charge to the amount of the use. The reason for the Court's discussion was to point out that the license fee considered in that case did not contain *any* feature which identified it as a charge for the privilege of using the highways. A consideration of that case, and of *Morf* vs. *Bingaman*, 298 U. S. 407, will show that if the Act involved in *Interstate Transit* vs. *Lindsey* had provided, as is provided in Chapter 402, that payment of the fee is a condition precedent to the use of the highways, the Act considered in the *Interstate Transit case* would have been held valid, regardless of its other provisions.

On pages 76 to 79 of his brief, appellee cites certain cases. In every one of them the principle is plainly stated that where the Act shows on its face that it imposes a police power regulatory fee, or a charge for the privilege of using the highways, or both, that the burden is on the one attacking it to show that it is unreasonable in amount.

The points argued from page 79 to the end of

appellee's brief have been fully covered on pages 27 to 61 of appellants' original brief.

Much of appellee's entire argument overlooks the familiar principle as to the respective functions of courts and legislatures expressed in *Stephenson* vs. *Binford*, 287 U. S. 251:

> "The assailed provisions, in this view, are not ends in and of themselves, but means to the legitimate end of conserving the highways. The extent to which, as means, they conduce to that end, the degree of their efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the sound judgment of the legislature, and not to that of the courts. It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end."

The decree of the District Court should be reversed.

Respectfully submitted,

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APPENDIX A

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO
(No. 6367)

GEO. B. WALLACE, INC., a corporation; WENTWORTH & IRWIN, INC., a corporation; RAYMER MOTOR COMPANY, a corporation; D. E. WALLACE, doing business under the trade name and style of WALLACE BROTHERS; COHEN-ANDERSON MOTOR CO., INC., a corporation; LAMPING MOTORS, INC., a corporation; LEWIS & CULBERSON, INC., a corporation; TRANSPORT CORPORATION, a corporation; W. R. PADDOCK, doing business under the trade name and style of Paddock Motors Co.; ALLEN MOTOR COMPANY, a corporation; LINEHAM MOTOR CORPORATION, a corporation; CHARLES NELSON, doing business under the trade name and style of Charles Nelson Company; J. T. DAVIS, doing business under the trade name and style of Twin Falls Motor Company; MID-COLUMBIA GARAGE, INC., a corporation; WILLIAM H. McLOUGHLIN, doing business under the trade name and style of McLoughlin Auto Company; M. J. GOSS; FOSTER MOTOR CO., INC., a corporation; BOISE MOTOR CAR COMPANY, a corporation; for and in behalf of themselves and all others similarly situated,

Respondents,

vs.

EMMITT PFOST, as Commissioner of Law Enforcement of the State of Idaho,

Appellant,

and

R. M. LOGSDON, doing business under the firm name and style of Sunset Motor Company,

Intervener and Respondent.

Pocatello, Sept. Term, 1936.
Filed Jan. 18, 1937.
Clay Koelsch, *Clerk.*

Appeal from the District Court of the Third Judicial District, for Ada County. Hon. Charles E. Winstead, Judge.

Suit to obtain an injunction. Judgment for plaintiffs. *Reversed.*

Bert H. Miller, Attorney General, Ariel L. Crowley, Assistant Attorney General, and Lawrence R. Quinn, Assistant Attorney General, for Appellant.

Dean Driscoll, for Respondents.

BUDGE, J.

The Second Extraordinary Session of the 1935 Legislature enacted a law now commonly known as the "Caravan Act," (Chapter 2, Second Extraordinary Session Laws of 1935) levying a fee of $5.00 per caravaned automobile transported from without the State, on its own wheels or in tow of another motor vehicle, for the purpose of selling or offering the same for sale. This appeal by the Commissioner of Law Enforcement is from a final judgment entered after a trial on the merits in the District Court, enjoining the commissioner, as the officer charged with such duty, from enforcing as against respondents the "Caravan Act," on the ground that the same is unconstitutional under both State and Federal constitutions in several respects.

The action was originally instituted by four automobile dealers engaged in "caravaning" automobiles who brought the action "for and in behalf of themselves and all others similarly situated." Thereafter 13 additional automobile firms or dealers intervened for like relief, and one additional automobile company thereafter joined as plaintiff in an

amended complaint. Respondents are citizens and residents of either the State of Washington, Oregon or Idaho, all dealing in automobiles, with their repective places of business in one of said states. All drive or tow automobiles, new or used, singly or in groups, from eastern factories, or neighboring states in the case of used cars, to their respective places of business for the purpose of selling or offering the same for sale. A portion of respondents are resident automobile dealers and so licensed; others are non-residents or foreign automobile companies engaged in "caravaning" automobiles from without the state and through the state. Respondents alleged in the lower court and here contend to like effect that:

> "1. That the subject of the act was not specified in the proclamation convening the special session which enacted it, in violation of Section 9 of Article IV of the State Constitution (a point not sustained below).
>
> "2. That the subject of the act is not expressed in the title, in violation of Section 16 of Article III of the State Constitution (likewise overruled below).
>
> "3. That the act violates the commerce clause, Article 1, Sec. 8, of the United States Constitution.
>
> "4. That it (a) deprives plaintiffs of their liberty and property without due process of law, and (b) denies them the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, and (c) the similar provisions of Section 13 of Article 1 of the State Constitution.
>
> "5. That it abridges the privileges and immunities of citizens of the United States, in violation of the Fourteenth Amendment.

"6. That it deprives citizens of states other than Idaho of the privileges and immunities enjoyed by citizens of Idaho, in violation of Section 2 of Article IV of the United States Constitution.

"7. That it is a toll for the use of Federal aid roads, as forbidden by the acts of Congress (also overruled below)."

The lower court's findings and conclusions were in favor of respondents, except as indicated above, and judgment was entered enjoining the Commissioner of Law Enforcement from enforcing as against respondents the "Caravan Act." Appellant sets forth 29 assignments of error, raising various questions. These assignments have been examined and we have concluded that the decisive questions involved are those hereinafter discussed and we think it unnecessary to discuss each assignment of error separately.

The record discloses there are at least two types or classes of respondents in this action with respect to their residence or place of doing business. On the one hand there are those respondents who are Idaho resident automobile dealers, regularly licensed as such, engaged in transporting automobiles from without the state, on their own wheels or in tow of another motor vehicle, for the purpose of selling or offering the same for sale, and who claim that the "Caravan Act" discriminates against them. On the other hand there are those respondents who are nonresidents or foreign companies or operators, not required to be licensed as dealers in Idaho, and who are engaged in transportation from without the state of motor vehicles, operating on their own

wheels or in tow of another motor vehicle, for the purpose of selling or offering the same for sale, and which foreign or non-resident persons or corporations transport their cars through and out of the state. These claim discrimination against themselves by reason of the failure of the "Caravan Act" to include within its terms commerce within the state and commerce originating in the state and moving out. These may best be considered separately and we shall first consider the claims of non-resident operators, who attack the validity of the statute, charging that it is repugnant to the commerce clause (Article I, Section 8), the Fourteenth Amendment to the Constitution of the United States, Section 13 of Article I of the State Constitution, and Section 2 of Article IV of the United States Constitution.

The "Caravan Act" (Chapter 2, Extraordinary Session Laws of 1935) recites that:

> "SECTION 1. The term 'caravaning' as used in this act shall mean the transportation from without the state of any motor vehicle operating on its own wheels or in tow of another motor vehicle for the purpose of selling or offering the same for sale to or by any agent, dealer, manufacturer's representative, purchaser, or prospective purchaser, *whether such agent, dealer, manufacturer's representative, purchaser, or prospective purchaser may be located within or without this state.*"

The statute then prohibits the use of the highways of the state for the "caravaning" of motor vehicles unless and until there shall have been secured from the Department of Law Enforcement of the State

of Idaho a special permit as herein authorized. The pertinent part of the statute reads:

> Be it enacted . . . No person shall use any highway in this state for transporting motor vehicles unless and until there shall first have been secured from the Department of Law Enforcement of the State of Idaho a special permit as to each vehicle so transported for use of the highways of this state in transporting such vehicle.
>
> Be it further . . . As a condition precedent to the issuance of any special permit provided for in Section Two of this Act, the Department of Law Enforcement of the State of Idaho shall charge and collect a fee of five dollars ($5.00) for each motor vehicle for which a carrying permit may be issued, whether such vehicle be operated under its own power or in tow of another motor vehicle.

Finances for the construction, maintenance and policing or regulation of traffic in the State of Idaho are derived in the main from various fees, licenses, taxes, and charges imposed upon motor vehicle operators, such as fees for the registration of motor vehicles owned or used in this state, (I. C. A., Section 48-127), (I. C. A., Section 39-411), operator's licenses, (Chapter 88, 1935 Session Laws), taxes on the sale of motor fuel (Chapter 46, 1933 Session Laws), automobile dealer's license (I. C. A., Section 48-130, as amended chap. 30 and chap. 152, 1935 Session Laws), certificates of title (I. C. A., Section 48-406), fines and penalties for violations of the motor vehicle laws, ad valorem taxes and other sources.

It may be conceded that respondents, non-resi-

dents pay certain taxes imposed alike on those engaged in using automobiles in the State of Idaho whether residents or non-residents, such as the tax on motor fuel. However prior to the enactment of the Carroll Act foreign and non-resident corporations or persons engaged in the transportation of motor vehicles on their own wheels or in tow of another motor vehicle from without the State for the purpose of selling or offering the same for sale were required to pay the registration license fee or automobile dealer's license fee for the privilege of using the highways of the State such as was imposed upon resident automobile dealers by I. C. A. Section 48-310 as amended, and chap. 152, 1935 Session Laws and I. C. A. Section 48-406 (e). It is well settled that a State may impose a charge, registration or license fee, on those using motor vehicles in the State although engaged in interstate commerce, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and regulating the traffic thereon. *Hicklin v. Bruneau* 12 F. Supp. 758; *Interstate Busses Corporation v. Blodgett* 276 U. S. 245, 48 S. Ct. 230, 72 L. Ed. 556; *Henderson v. Mayor* 92 U. S. 259, 23 L. Ed. 543; *Lane v. New Jersey* 262 U. S. 552, 43 S. Ct. 650, 67 L. Ed. 1117; *Interstate Busses Corp. v. Lindsey* 278 U. S. 168, 73 L. Ed. 254, 49 S. Ct. 102; *Aero Mayflower Transit Co. v. Georgia Public Service Commission* 295 U. S. 285, 55 S. Ct. 709, 79 L. Ed. 1439; *Aero v. Brennan* 80 L. Ed. 1284, 299 U. S. 407; *Aero v. Lewis* 24 F. Supp. 922 at 932 (dissenting opinion).

The statutes imposing a tax, fee or license upon resident automobile dealers and the Caravan Tax, (Chapter 2, Second extraordinary Session Laws of 1935) imposing a tax, license or fee upon non-resident persons or corporations engaged in transportation of motor vehicles in interstate commerce on their own wheels or in tow of another motor vehicle, for the purpose of selling or offering the same for sale, are complementary in the sense that while both levy a tax, license or fee for the privilege of the use of the highways of the State with relation to the sale of motor vehicles, the receipts to be expended for highway maintenance, construction and policing, one affects only resident automobile dealers and the other affects non-resident dealers, corporations or persons who are not required to be licensed as a resident automobile dealer. Discrimination is not shown as between these by merely showing that the two statutes are different in form or adopt a different measure or method of assessment. The firmly established rule placed the burden upon the non-resident persons, corporations or dealers, engaged in "caravaning" automobiles to both plead and prove, not only that the tax is inapplicable to intrastate commerce, but that in actual practice the tax falls upon interstate commerce with an economic weight disproportionate to the burden of taxation imposed upon intrastate commerce. (*Interstate Busses Corporation* vs. *Blodgett, supra; General American Tank Car Corp.* vs. *Day*, 270 U. S. 367, 70 L. Ed. 635, 46 S. Ct. 234; *Hendrick* vs. *Maryland*, 235 U. S. 610, 59 L. Ed. 365, 35 S. Ct. 140; *Interstate Busses Corp.* vs. *Holyoke Street Ry. Co.*, 273 U. S. 45, 51 47 S. Ct. 298, 71 L. Ed. 530, 534.)

The complaint in this case contains no averment of disproportionate economic burden, and the findings of fact, if sufficient in form (which it is not necessary to decide) do not purport to find that a disproportionate economic burden exists; nor did the respondents make any effort, either by pleading or proof, to demonstrate the existence of such unequal economic burden. In disposing of a similar case upon the same ground the Supreme Court of the United States said in *Interstate Busses Corporation vs. Blodgett*, *supra*:

> "To gain the relief for which it prays, appellant is under the necessity of showing that in actual practice the tax falls with disproportionate economic weight on it. . . . The record does not show that it made any attempt to do so."

Failing to bear the burden cast upon them in this relation, the judgment in favor of non-resident respondents is unsupported by the record, and must be reversed.

It appears that the same conclusion must be reached with reference to the transportation of motor vehicles from within the state on their own wheels or in tow of another motor vehicle for the purpose of selling or offering the same for sale. There is no showing that automobiles are manufactured in this state. There is evidence of isolated cases where new automobiles have been transported from within the state from resident dealers' places of business, for the purpose of resale and possible transportation of used automobiles from within the state for the purpose of resale. The evidence also discloses that ordinarily such used cars already bear

state licenses, and it appears that in the case of the new automobiles a fee privileging their use of the highways of the state had already been exacted in the payment of resident dealers' license or Caravan Tax upon their coming into the state. A quantum of business, such as would defeat the classification as made by the legislature, does not appear to have been shown; and it further appears that respondents in this relation did not demonstrate actual discrimination or the existence of unequal economic burden. We are satisfied that the act is not repugnant to, or in conflict with, any of the various constitutional provisions urged by such respondents, and heretofore enumerated.

Coming now to the question of the constitutionality of the act when applied to resident dealers actively engaged in caravaning, Section 1 of the act provides:

> "The term 'caravaning' as used in this act shall mean the transportation from without the state of any motor vehicle operating on its own wheels or in tow of another motor vehicle for the purpose of selling or offering the same for sale to or by any agent, dealer, manufacturer's representative, purchaser, or prospective purchaser, *whether such agent, dealer, manufacturer's representative, purchaser, or prospective purchaser may be located within or without this state. . . .*"

Construing the language as used in the italicized portion of section 1 of the act strictly in accordance with the language there used, it would seem that it was the intention of the legislature to impose the caravan tax upon both interstate automobile deal-

ers, engaged in caravaning, and resident automobile dealers, engaged in the same traffic, or caravaning. The act provides, as will be observed, that it shall be effective "whether such agent, dealer, manufacturer's representative, purchaser, or prospective purchaser may be located *within or without this state.*" The act does not provide that it shall apply only to interstate automobile dealers caravaning cars from without this state. The act makes no distinction as between automobile dealers caravaning, whether they be located within or without this state. While it may be insisted that the tax can not be constitutionally imposed, where the motor vehicles caravaned are brought into the state to be sold or offered for sale by resident dealers, for the reason that it would exact from such resident dealers, in addition to other taxes they are required to pay, the added burden of the caravan tax and thus placing a double burden of taxation upon such resident dealers transporting from without the state any motor vehicles in the manner specified in section 1 of the act. It cannot be gainsaid that the resident automobile dealer caravaning will be required to pay, not only other taxes exacted under various statutory provisions, but also the caravan tax. However, it does not necessarily follow that the act would be unconstitutional for this reason. Article 7, Section 5, of the Constitution, does not prohibit dual taxation of property unless it relates to ad valorem taxes. (*State* vs. *Doherty*, 3 Ida. 384, 29 Pac. 855; *State* vs. *Union Central Life Insurance Co.*, 8 Ida. 240, 67 Pac. 647; *State* vs. *Jones*, 9 Ida. 693, 75 Pac. 819; *In re Gale*, 14 Ida. 761, 95 Pac. 679; *Northern Pacific Railway Co.* vs. *Gifford*, 25 Ida. 196, 136 Pac.

1131; *In re Kessler*, 26 Ida. 764, 146 Pac. 113; *Hartman* vs. *Meier*, 39 Ida. 261, 227 Pac. 25; *Smallwood* vs. *Jeter*, 42 Ida. 169, 244 Pac. 149; *Diefendorf* vs. *Gallet*, 51 Ida. 619, 10 Pac. (2d) 307; *J. C. Penney Co.* vs. *Diefendorf*, 54 Ida. 374, 32 Pac. (2d) 784; *Garrett Transfer, etc. Co.* vs. *Pfost*, 54 Ida. 576, 33 Pac. (2d) 743.) The caravan tax does not exact an ad valorem tax, but an excise or license tax.

From the language used in section 1 of the caravan act, supra, it may be logically contended that the legislature, when enacting the caravan act, was of the opinion that the registration and licensing of local dealers related in no way to caravaning cars either into or across the state; and that in so far as the local dealer was concerned he was at that time on an equality with and in the same position as the non-resident dealer with respect to the caravaning of cars as defined in the act they were about to pass. The act does not pretend to cover the movement of cars wholly within the state, but confines the meaning of the term to cars only from without the state. This leaves local owners and dealers at liberty to operate, move and transport cars from place to place, wholly within the state, the same as before the passage of the act and without reference to compliance with the terms of the caravan act. Now, conceding that the imposition of a license fee or tax, on all cars brought into the state by the means and for the purposes designated in the act (Section 1), is not a discrimination against interstate commerce or in violation of the commerce clause of the Constitution (Article 1, section 8), and is valid under the holding in *Morf* vs. *Bingaman*, 80 L. Ed. 1245, it is not apparent how or why the exaction of a fee from

a resident dealer engaged in "caravaning," as defined in the act, is any discrimination against him and in favor of a non-resident dealer doing the same thing. The fact that the local dealer has paid his registration fee and has acquired his allotted number of dealer's plates, which he may attach to cars he moves on the state highways, does not and should not protect him after he goes out into a foreign state and brings into this state a caravan of cars "for the purpose of selling or offering the same for sale" and by such means subjecting the state highways to an additional load or burden to which his local dealer's license could not subject them, except for someone caravaning these additional cars into the state. The non-resident dealer who caravans cars into or through Idaho by only paying the caravan tax does not acquire like privileges enjoyed by the resident dealer under registration as a domestic or local dealer. The requirement that the resident dealer pay the same fee or license tax for caravaning as exacted from the non-resident is not an unreasonable or unfair discrimination against either for the reasons heretofore stated. (*Morf* vs. *Bingaman, supra.*) Construing the language as used in Subdivision 1 of the act, it would seem to warrant the conclusion that it has application to all persons, corporations, partnerships or whatnot, either resident or foreign dealers who caravan cars from without the state into the state or through the state.

The caravan tax is imposed for the privilege accorded the caravaner to enter upon the highways of the state and for the privilege of the use of its roads and to compensate the state for the extra costs for the construction, maintenance and policing of the

state highways, and is expended by the state for that purpose.

We take judicial notice of the fact that there are no manufacturing plants in this state for the building and construction of automobiles and transporting the same from within to without the state. It further appears from the record that caravaning from within to without the state by domestic automobile dealers is so negligible as to justify the conclusion that there is no discrimination in favor of domestic dealers engaged in the traffic of caravaning as would warrant the holding that the act is unconstitutional, for the reason that it discriminates between interstate automobile dealers and domestic dealers caravaning from without to within the state.

We are not unmindful of the rule, as heretofore announced by this court, that in construing a statute, attacked on the ground of its constitutionality, the court must adopt such a construction as will sustain its constitutionality if reasonably possible. (*Achenbach* vs. *Kincaid*, 23 Ida. 768, 140 Pac. 529; *Smallwood* vs. *Jeter*, 43 Ida. 169, 244 Pac. 149; *Williams* vs. *Baldridge*, 48 Ida. 618, 284 Pac. 203; *J. C. Penney & Co.* vs. *Diefendorf*, 54 Ida. 374, 32 Pac. (2d) 784.)

The judgment is reversed and the cause remanded with instructions to the trial court to enter findings, conclusions and judgment in accordance herewith.

Morgan, C. J., and Holden, Ailshie, and Givens, J., concur.

APPENDIX B

(Chapter 2, Second Extraordinary Session Laws of Idaho of 1935—Idaho Caravan Act).

AN ACT

TO REGULATE THE CARAVANING OF MOTOR VEHICLES UPON THE PUBLIC HIGHWAYS OF THE STATE OF IDAHO; DEFINING THE TERM "CARAVANING"; PROVIDING FOR THE LICENSING OF MOTOR VEHICLES IN CARAVANS AND FIXING THE FEE THEREFOR; DEFINING THE DUTIES OF THE DEPARTMENT OF LAW ENFORCEMENT IN REGARD THERETO; CREATING THE "MOTOR VEHICLE CARAVAN FUND" IN THE STATE TREASURY AND PROVIDING FOR THE DISBURSEMENT OF SUCH FUND; IMPOSING PENALTIES FOR VIOLATION OF THIS ACT; AND DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF IDAHO:

SECTION 1. The term "caravaning" as used in this act shall mean the transportation from without the state of any motor vehicle operating on its own wheels or in tow of another motor vehicle for the purpose of selling or offering the same for sale to or by any agent, dealer, manufacturer's representative, purchaser, of prospective purchaser, whether such agent, dealer, manufacturer's representative, purchaser or prospective purchaser may be located within or without this state. The caravaning of motor vehicles as herein defined shall be considered as the transportation of property for hire by motor vehicle upon the public highways of this state.

The term "person" when used in this act shall be construed to mean any person, firm, association, partnership, corporation, lessee, trustee, receiver, or company engaged in or intending to engage in the business of caravaning as defined in this act.

SECTION 2. No person shall use any highway in this state for caravaning motor vehicles unless and until there shall first have been secured from the Department of Law Enforcement of the State of Idaho a special permit as to each vehicle so caravaned for use of the highways of this state in caravaning such vehicle, which permit shall be dis-

played by posting the same upon the windshield of each such vehicle or in other prominent place thereon, where it may be readily legible. It shall be unlawful to operate a motor vehicle or group of motor vehicles in caravaning unless a space of at least 150 feet shall at all times be maintained between each vehicle or group of vehicles being so caravaned, a group being defined as one motor vehicle operated under its own power with one motor vehicle in tow.

SECTION 3. As a condition precedent to the issuance of any special permit provided for in Section Two of this act, the Department of Law Enforcement of the State of Idaho shall charge and collect a fee of five dollars ($5.00) for each motor vehicle for which a caravaning permit may be issued, whether such vehicle be operated under its own power or in tow of another motor vehicle; provided, however, that no such permit shall be issued by said Department of Law Enforcement unless and until the applicant therefore shall have produced evidence to the satisfaction of said Department of Law Enforcement that all of the laws of this state relating to the transportation of property upon the public highways for hire shall have been complied with.

SECTION 4. No permit issued under this act for caravaning motor vehicles shall be transferable either as between persons or as to the vehicle for which it is issued, and shall only be valid for the trip to be specified in said permit; and in no event shall such permit be valid for a period of more than thirty (30) days after it shall have been issued. Such permit shall contain such information and be in such form and shall be issued under such rules and regulations as may be prescribed by said Department of Law Enforcement. Such permit shall be conditioned upon the permittee's complying with all of the laws of the State of Idaho and of the United States.

SECTION 5. The fee paid for any caravaning permit issued under this act shall be in lieu of all other registration fees and license fees for the use of public highways in this state by any motor vehicle during the period that such motor vehicle may be operated under and in accordance with such permit upon the public highways in this state; provided, however, that nothing in this section shall exempt the owner or operator of such vehicle from compliance, except with respect to fees or license charges, with all of the laws of this state now or hereafter adopted, relating to the transportation of property for hire.

SECTION 6. There is hereby created in the state treasury a fund to be known as the "Motor Vehicle Caravan Fund" and all fees collected by the Department of Law Enforcement under this act shall be paid into said fund. The moneys derived by the provisions of this act are intended for the added expense which the state may incur in the administration and enforcement of this act and the added expense of policing the highways over which such caravaning may be conducted and to compensate the state for the additional cost of maintenance of such highways, so as to provide for the safety of traffic on such highway where caravaning is being conducted.

SECTION 7. The Department of Law Enforcement is charged with the administration and enforcement of this act, and, with the approval of the Governor, is authorized to employ such additional clerical and other assistance as shall be necessary for the administration and enforcement of this act, such clerical and other assistants to be paid such compensation as may be fixed by the Department of Law Enforcement from said Motor Vehicle Caravan Fund.

SECTION 8. Any moneys remaining in said Motor Vehicle Caravan Fund on the 31st day of December of each year, after the payment of such added expense in the administration and enforcement of this act and the added expense of policing said highways, shall be transferred to and become a part of the State Highway Fund in the State Treasury.

SECTION 9. All moneys accruing to said Motor Vehicle Caravan Fund are hereby appropriated to the purposes aforesaid.

SECTION 10. Any violation of the provisions of this act is a misdemeanor punishable by a fine of not less than $50.00 nor more than $300.00 or by imprisonment in the county jail for not more than six (6) months or by both such fine or imprisonment.

SECTION 11. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect from and after its passage and approval.

JAN 28 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT
OF THE
UNITED STATES.

October Term, 1936
No. 456.

Ray Ingels, as Director of the Motor Vehicle Department of the State of California; Howard E. Deems, as Registrar of the Motor Vehicle Department of the State of California; John C. Corbett, Fred E. Stewart, R. E. Collins, Ray Edgar, and Ray Riley, as members of the State Board of Equalization and constituting said board in the State of California; and E. Seymour,

Appellants,

vs.

Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company; United States Fidelity and Guaranty Company, a corporation; and Continental Casualty Company, a corporation,

Appellees.

BRIEF OF APPELLEES WITH APPENDIX.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No. 456

Ray Ingels, as Director of the Motor Vehicle Department of the State of California; Howard E. Deems, as Registrar of the Motor Vehicle Department of the State of California; John C. Corbett, Fred E. Stewart, R. E. Collins, Ray Edgar, and Ray Riley, as members of the State Board of Equalization and constituting said board in the State of California; and E. Seymour,

Appellants,

vs.

Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company; United States Fidelity and Guaranty Company, a corporation; and Continental Casualty Company, a corporation,

Appellees.

BRIEF OF APPELLEES WITH APPENDIX.

OPINION BELOW.

The opinion of the District Court is reported in 14 Federal Supplement 922. [R. 76.]

APPELLEES' STATEMENT OF THE CASE.

Appellees cannot adopt the appellants' statement of the case in its entirety, and must take exception to so many portions thereof, that they deem it advisable to present their own statement rather than attempt to specifically differentiate from appellants' statement.

Appellees in this case are Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company, United States Fidelity and Guaranty Company, and Continental Casualty Company, corporations. The two last named appear here solely because they are sureties on the bonds posted by appellee, Howard Morf; therefore when the designation "Appellee" appears in this brief, we shall mean the appellee, Howard Morf.

APPELLEES' STATEMENT OF THE FACTS.

Appellee is engaged in the business of buying and selling cars at wholesale only, in the city of Los Angeles, California. He purchases automobiles in other parts of the country and brings them to his place of business in Los Angeles, having been so engaged since 1928 or 1929. [R. 60, 61.]

In September, 1935, appellee purchased a 1934 Dodge sedan car in the state of Texas. Immediately thereafter said car was driven to the border line of California, near Blythe, California. [R. 5, 39.] Said car was driven singly, not in company with any other car, and not in caravan, procession or fleet. [R. 5, 39, 77.] Appellants demanded of appellee the sum of $15 before they would allow said car to enter California. [R. 5.] Appellants

based their demand on the provisions of Chapter 402, Statutes of 1935, of California, page 1453. [R. 10 *et seq.* Appendix B.]

The fact is, and the evidence shows, that approximately 30% to 40% of the cars imported by appellee are driven into California alone, as a single unit, without having a car attached thereto, and not in company with any other cars coming into California. [R. 60.] Appellants demand the sum of $15 for each of these vehicles as above set forth.

In September, 1935, appellee also purchased a 1935 Dodge sedan car in the state of Louisiana, and a 1934 Oldsmobile coupe car in the state of Texas. Immediately thereupon said cars were driven by appellee to the border line of California near Blythe, California. The Oldsmobile coupe was towed, being attached to the rear of the Dodge sedan. Said cars were driven as a unit, not in company with any other cars, and not in group, procession or fleet. [R. 5.] Appellants demanded of appellee the sum of $30 for said vehicles before they would allow them to be imported into California, basing their demand on Chapter 402, Statutes of 1935, of California, page 1453. [Appendix B.]

Not over 60% to 70% of the cars imported by appellee are in groups or fleets, as distinguished from the single non-group car movements above referred to. [R. 60, 62.]

The cars are operated directly under appellee's supervision and responsibility and not under contract [R. 61], and are driven by persons in appellee's employ. [R. 62.] Appellee does no radio or newspaper advertising for any individuals to drive cars. [R. 61.]

When the cars are imported in caravans, the average number of cars is 12. The buyer, or manager, and a "trouble-shooter", who attends to the mechanical condition of the cars, always drive single cars, which single cars are not counted or included in the 30% to 40% of single cars imported by appellee and which latter cars are not in company with any other vehicle, and not in group, processsion or fleet. [R. 62.]

Appellee imported into the state of California, between January 1st, 1935, and November 29th, 1935, approximately 3,000 cars. [R. 63.] He imports only his own motor vehicles, and is not engaged in transporting the vehicles of others or any property or persons for hire. [R. 62, 63.] His average net profit on each car ranges from $10 to $15 [R. 61], hence the profit on each car is equal to, or less than, the tax sought to be imposed by the act here in question.

From January 1st, 1935 to November 29th, 1935 (the date of trial) approximately 14,000 cars were imported into the state. [R. 58.]

All cars purchased by appellee are brought to his place of business in Los Angeles and thereafter he sells or trades all of them. He sells them to various dealers in the state of California, and does a nice business in San Francisco, San Diego, Riverside, San Bernardino, Bakersfield, Fresno, and all points of the state, and in Seattle, Washington and Portland, Oregon. About one-half of the automobiles imported by appellee are sold to dealers located outside the city of Los Angeles, who come to appellee's place of business and buy these automobiles, and drive them away, on their own wheels, for the purpose of sale. [R. 60, 61.]

When one automobile is attached to another, tow-bars and safety chains are used. There is no particular hazard in driving an automobile with another towed to it. [R. 61.] As to any possible traffic hazards created by the movement of the cars which appellee imports into California the appellee, Morf, testified that he had ridden in one of these automobiles which was towing another and had stopped the front car, and that he had had no difficulty in driving an automobile with another towed to it nor had he noticed any particular hazard in so driving [R. 61]; also he has actually caravaned cars from eastern points and has personally taken charge of bringing them through; that he has observed groups of cars being driven into California and there has been nothing in the method or manner of such driving that would create a traffic hazard. It has not proven hazardous to him and his cars have not been involved in any accidents, nor have any of his drivers been arrested. [R. 52.]

Appellants' witness Dillon, a California highway patrolman for 8½ years, testified that he has observed some violations of the California Vehicle Act by the drivers of cars being driven *in groups or caravans.* None of the violations mentioned, however, are any different than the usual and ordinary violations commonly perpetrated by the ordinary motorist driving a car in California, or into California, the entry of which is not for the purpose of sale. [R. 51.]

Appellants' witness Walsh, a California highway patrolman for 5 years, and patrolling a portion of the same

highway as patrolled by the witness, Dillon, testified that *"on one or two occasions"* while going to his office, he had come in contact with *group or caravan* movement of cars. [R. 47.] He had not noticed any accidents by reason of these group or caravan cars, relative to private cars. [R. 49.] He had never issued any citations to these drivers for violations of the traffic laws. [R. 48.] In every instance there is a man in charge of group movements who is a resident of the state of California. [R. 49.] There would be no more danger or hazard in bringing a single car into California for the purpose of sale, than for any other purpose. [R. 50.] The California Vehicle Code provides for safety chains between cars, and this is a recognized standard principle for towing vehicles in California, and it is permissible and lawful. [R. 50.] If cars were towed together in the same manner, *i. e.*, by tow-bar or safety chains, wholly within the state, they would react in exactly the same manner as cars towed from without to within the state. [R. 50.] The witness testified that he did not know how many cars, single, without any cars attached to them, traverse his beat in any single day and that he would have no particular occasion to know that such cars were brought into California for the purpose of sale. [R. 49, 50.]

Appellants' witness, Cato, chief of the California Highway Patrol, testified that the fleet movement, where made up of more than 4 or 5 cars, constitutes a hazard and causes certain traffic difficulties. [R. 56.] (The group movement of four cars or less does not create a hazard.)

Approximately six additional men were put on over the whole state because there were group movements of cars on the roads. If the caravaning business were entirely eliminated, these men could be dispensed with on routes they now patrol, but *their services would not be dispensed with,* and they would be moved to other locations to work. They get a salary of $170 per month. [R. 53.]

There is caravaning of cars on their own wheels for the purpose of sale, intrastate, within the state of California. [R. 54, 58, 61.]

The Legislature of California intended to stop caravaning altogether, not regulate it, because it was bringing itinerants into the state, and this was the real object in enacting the Caravan Act. [R. 55.]

The appellants' witness Martland testified that he told the Legislative Committee:

> "That California automobile plants employed several thousand men and that caravaning, from an economic standpoint, was very definitely a threat to local employment, in addition to which it was bringing in a number of transients." [R. 57.]

Also:

> "The purpose was to reduce caravaning by regulating it, as that would have been the probable effect." [R. 57.]

Further:

> "When the bill was first discussed, the fee was $50.00 and later cut to $15.00." [R. 57.]

THE ISSUES.

The issues in this case are clearly defined. They are:

I.

When appellee, in the month of September, 1935, purchased, in the state of Texas, a 1934 Dodge sedan car, bearing 1935 Texas license plates No. 865530, and brought said car to the state line of California, alone, and not in company with any other car, and attempted to bring said car into California on its own wheels for the purpose of sale, and when appellants did then and there demand of appellee a tax of $15.00 before permitting appellee to bring said car into California, and did further demand that appellee comply with all other provisions of Chapter 402 of the Statutes of 1935 of the state of California, and did further threaten to make like demands in the future with respect to all other cars which appellee may seek to import into California in like manner, were such demands and threats of future demands violative of appellee's rights under

(A) The "Commerce Clause" of Article I, Section 8, of the Constitution of the United States?

(B) The "Equal Protection" and "Due Process of Law" clauses of the Fourteenth Amendment of the Constitution of the United States?

II.

When, in the month of September, 1935, appellee purchased, in the state of Louisiana, a 1935 Dodge sedan car, bearing 1935 Louisiana license plates No. 108946, and purchased a 1934 Oldsmobile coupe car in the state of Texas, bearing 1935 Texas license plates No. 869642, and brought said cars to the state line of California in tandem, *i. e.,* the Dodge sedan towing the Oldsmobile coupe, and which cars were alone, and not in company with any other cars, and attempted to bring said cars

into California, in such manner, on their own wheels, for the purpose of sale, and when appellants did then and there demand of appellee a tax of $30.00 before permitting appellee to bring said cars into California, and did further demand that appellee comply with all other provisions of Chapter 402 of the Statutes of 1935 of the state of California, and did further threaten to make like demand in the future in respect to all other cars which appellee may seek to import into California in like manner, were such demands and threats of future demands violative of appellee's rights under:

(A) The "Commerce Clause" of Article I, Section 8, of the Constitution of the United States?

(B) The "Equal Protection" and "Due Process of Law" clauses of the Fourteenth Amendment to the Constitution of the United States?

III.

When appellee purchases cars in states other than California, and seeks to import them into California, in fleet or group movements, on their own wheels, for the purpose of sale, and when appellants demand of appellee a tax of $15.00 for each of said cars in said group or fleet, before permitting appellee to bring said cars into California, and further demand that appellee comply with all other provisions of Chapter 402, of the Statutes of 1935 of the state of California, and further threaten to make like demands in the future with respect to all other cars which appellee may seek to import into California in like manner, were such demands and threats of future demands violative of appellee's rights under:

(A) The "Commerce Clause" of Article I, Section 8, of the Constitution of the United States?

(B) The "Equal Protection" and "Due Process of Law" clauses of the Fourteenth Amendment to the Constitution of the United States?

SUMMARY OF THE ARGUMENT.

I.

The District Court's findings should be sustained.

II.

Chapter 402 discriminates against interstate commerce, and denies appellee the equal protection of the law.

A. The attempted exaction by appellants from appellee of a tax of $15.00, as provided in Chapter 402, before permitting appellee to transport into the state of California, a single car, alone, and not in company with any other car, upon its own wheels and for the purpose of sale, violates appellee's rights under the Commerce Clause of Article I, Section 8, and the Equal Protection and Due Process clauses of the Fourteenth Amendment to the Constitution of the United States.

A-1. The Caravan Act discriminates against appellee, who drives his cars singly into California for the purpose of sale, and in favor of other persons: (a) Who drive cars singly from without to within California for purposes other than sale, and, (b) Who drive cars singly, wholly within California, for purposes other than sale.

A-2. The Caravan Act discriminates against appellee in the interstate importation of his singly driven cars, not in fleet, in favor of singly driven cars moving wholly intrastate, in like manner and for the purpose of sale.

B. The attempted exaction by appellants from appellee, of a tax of $30.00, as provided in Chapter 402, be-

fore permitting appellee to transport into California two automobiles, one in tow of another, not in company with any other automobiles, upon their own wheels, and for the purpose of sale, violates appellee's rights under the Commerce Clause, Article I, Section 8, and the Equal Protection and Due Process clauses of the Fourteenth Amendment to the Constitution of the United States.

C. The attempted exaction from appellee of a tax of $15.00, as provided in Chapter 402, when he seeks to import cars into California, in fleet or group movements, on their own wheels for the purpose of sale, violates appellee's rights under the Commerce Clause of Article I, Section 8, and the Equal Protection and Due Process clauses of the Fourteenth Amendment to the Constitution of the United States.

III.

The tax of $15.00, exacted by Chapter 402, is arbitrary, excessive, and an unconstitutional burden upon appellee's interstate commerce, and discriminates against him.

A. The $15.00 tax is not levied as compensation for the use, maintenance or construction of the highways.

IV.

The California Highway Carriers' Act does not apply to appellee.

V.

The $15.00 tax required under Chapter 402 is an import tax.

VI.

Authorities.

ARGUMENT.

I.

The District Court's Findings of Fact Should Not Be Disturbed.

Where there is any evidence to sustain a finding of fact, which has been found by the trial court, this Court will not disturb it on appeal.

In the case of *Doolcy v. Pease,* 180 U. S. 126, 131, this Court said:

> "Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different. Stanley v. Albany County Supers., 121 U. S. 547, 30 L. Ed. 1002, 7 Sup. Ct. Rep. 1234.
>
> "Errors alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals or by this court, if there was any evidence upon which such findings could be made. Hathaway v. First Nat. Bank, 134 U. S. 498, 38 L. Ed. 1006, 10 Sup. Ct. Rep. 608; St. Louis v. Rutz, 138 U. S. 241, 34 L. Ed. 946, 11 Sup. Ct. Rep. 337; Runkle v. Burnham, 153 U. S. 225, 38 L. Ed. 697, 14 Sup. Ct. Rep. 837."

The Supreme Court of California, in the case of *Hotaling v. Hotaling,* 193 Cal. 368, 224 Pac. 455, 56 A. L. R. 734, said:

> "Appellants contend that the findings of fact are inconsistent and conflicting and they specify a large number of instances of alleged inconsistencies therein. The great majority of the claimed inconsisten-

cies were solely in appellants' theory as to the legal effect which should be given to particular facts found. The findings are detailed and voluminous and in many respects are susceptible to a construction which would give rise to inconsistencies therein. It is the duty of an appellate court in reviewing the findings to give them a liberal construction so as to uphold rather than defeat the judgment. All the findings are to be read together and must be reconciled to prevent any conflict upon material points, if such reconciliation is possible."

At 4 *Corpus Juris,* page 857, it is said:

"Where the evidence is conflicting, the appellate court, in determining whether the evidence is sufficient to support a verdict, must assume that the evidence in favor of the successful party is true, leave out of consideration entirely evidence of the unsuccessful party in conflict therewith, and give to the evidence of the successful party every favorable inference which may be reasonably and fairly drawn from it." (Citing cases.)

We now consider the findings in consecutive order.

FINDINGS OF FACT NOS. 1, 2 and 3 [R. 34].

These findings are not disputed.

FINDING OF FACT NO. 4 [R. 34].

Appellants object to this finding on the sole ground that it is an argumentative proposition of law. We see no reason for extended argument on this point, as a mere reading of this finding negatives such contention. In our opinion, this finding was both necessary and proper to the decision of the trial court, and completely dispels the con-

tention of appellants made throughout this entire case, that the passage of the so-called Caravan Act (Chapter 402, Statutes of 1935) was necessary to prevent the importation of stolen automobiles into the state of California. An examination of all of the acts of the Legislature included in this finding readily discloses that Section 11o.5 of the Vehicle Code [Appendix C] was directed specifically at the problem of stolen cars being imported into the state of California.

FINDING OF FACT NO. 5 [R. 35 *et seq.*]

Not disputed.

FINDING OF FACT NO. 6 [R. 37]

Appellants' objection to this finding is that it is an argumentative proposition of law. The term "caravan" as applied to and used in the act is truly a misnomer, which fact may be readily ascertained from a reading thereof. This is particularly true when applied to a single car. The finding seems to be amply sustained by Webster's New International Dictionary; see "Caravan."

FINDING OF FACT NO. 7 [R. 37 *et seq.*].

Appellants object to this finding on the ground that it is an argumentative proposition of law.

We see nothing argumentative in this finding and think it should not be disturbed. The distinction made by this finding is important to the decision because it definitely holds that the so-called Caravan Act is not limited to fleet movements; especially so since the Court rightfully finds that "a tax upon such a single car movement, not in group or fleet, is one of the specific complaints in this

case." [R. 5, 66, and see Stipulation, Appendix A.] The balance of the finding is merely a factual statement of some of the provisions contained in the statute, and as such is unobjectionable.

FINDING OF FACT NO. 8 [R. 38].

Appellants' treatment of this finding [Br. 7 and 8; R. 23, 24] is a typical example of the unfairness of appellants in stating the evidence in this case. In the first place, in their exceptions to the 8th finding [R. 24] appellants except to said finding on the ground that it is not supported by the evidence (which is not true) and, upon the further ground that the evidence shows that the movement of a single vehicle as therein described, and the movement of all vehicles, included within the definition of caravaning, does present unusual police problems (also not true). Appellants changed their minds, however, when they treated this finding, together with others, in their brief to this Court. (Br. 7.) We quote:

> "As to such findings, however, the evidence is that substantially all of the vehicles brought into the State on their own wheels for purpose of sale are in fleets or caravans of 8 to 50 cars, [R. 47, 51, 56, 60, 62, 63.]"

Appellants found that they could not sustain the exception to the 8th finding from any part of the record, because the record is replete with evidence supporting said finding and because all of the evidence upon the point distinctly bears out the fact that the movement of a single vehicle does not present unusual police problems. Finding the evidence in such a state, appellants then seek

to escape this point by telling this Court that "substantially all of the vehicles brought into the state on their own wheels for purpose of sale are in fleets or caravans of 8 to 50 cars." This statement by appellants is positively not true. The trial court did not think that it was true, and the evidence most certainly does not bear out appellants' statement. Appellee testified that 30% to 40% of the automobiles imported by him were brought into the state on their own wheels, singly, and not in company with any other vehicle. [R. 60.] Appellants quote, in substantiation of their proposition, R. 47, 51, 56, 60, 62, 63. Let us examine these references. There is nothing on R. 47 that refers to appellants' statement, except that the witness Walsh says on the "one or two occasions" that he has come in contact with caravan cars there were approximately 10 to 40 cars in a caravan. There is nothing on R. 51 to support appellant's position, except that the witness Dillon testified that he has come in contact with the caravaning of automobiles and that the average number of cars in a caravan is "from 8 to 30 or 35 cars." There is nothing on R. 56 to substantiate appellants' claim, except that the witness Martland stated "the new cars, for the most part, run in caravans ranging from 10 to as high as 50 automobiles." There is nothing on R. 60 which substantiates appellants' claim but on the other hand on said page appears the testimony of appellee Morf, who directly testifies as follows:

> "In the operation of my business approximately 30 percent to 40 percent of the automobiles are driven into the State of California alone, as a single unit, with one driver driving an automobile, and the balance are brought into this state with one automobile towing another.

> "When I speak of bringing cars in, and 30 percent or 40 percent being single cars without having a car attached thereto I mean that such car comes through alone, without any regard to any other cars coming into California."

There is nothing on R. 62 to substantiate appellants' claim. This whole page is a portion of appellee Morf's testimony, and the only possible connection would be in his statement that: "In caravans the average number of cars is 12." There is nothing on R. 63 to sustain appellants' claim. This, too, is appellee Morf's testimony and has no connection with appellants' statement unless it be his testimony that "the average number of cars in a caravan is about 12."

Thus it will be seen that out of six references to the evidence which appellant presents to this Court to show this Court that, "the evidence is that substantially all of the vehicles brought into the state on their own wheels for the purpose of sale are in fleets or caravans of 8 to 50 cars," the only reference which refers materially to this point at all is the reference to page 60 of the record where appellee Morf definitely testifies the exact opposite, to-wit: that 30 to 40 percent of the automobiles imported by him into the state are driven in alone, as a single unit, with one driver driving an automobile and not in company with any other automobile.

FINDING OF FACT No. 9 [R. 38].

Appellants' objection to this finding is that it is contrary to the evidence.

Appellants' treatment of this finding is practically the same as that of finding No. 8. This finding is to the ef-

fect that the fleet movement, where made up of more than four automobiles, causes certain traffic difficulties, which are enumerated in said finding. It states, however, that these difficulties, as enumerated, are exceptions rather than the rule. Appellants contend, however, that "the evidence specifically shows that a caravan of four or more cars is a definite highway hazard [R. 55, 56], that law violation and unusual hazard is the rule in the operation of caravans and that a caravan as to which the contrary is true is an unusual and glowing exception. [R. 49.]"

Appellants, with the same disregard of accuracy as occurred with respect to finding No. 8, have again proceeded to distort the evidence.

There is nothing at R. 55 or 56 which supports appellants' sweeping statement above quoted. The testimony of the witness Cato, Chief of the California Highway Patrol, at R. 55, contains no statement of any "law violation" or "unusual hazard" by reason of the operation of caravans. He does state, however, that "the pick-up in business and new automobiles being faster and more modern are contributory causes to increased hazards on the highways, not alone on the highways where caravans come in, but on all highways; also, the increase in hauling, trucks, et cetera. All this has considerable to do with it. I have observed, when out on the road, big oil trucks and various other types of commercial vehicles that had trailers behind them." [R. 55.] In other words, the witness Cato himself does not say that "law violation" and "unusual hazard" is a rule, but merely that caravans of more than four automobiles have a tendency, along with other factors, to increase the hazard. Nowhere in the record does any witness testify that the caravaning of

more than four vehicles creates an "unusual hazard," nor does any witness even use said phrase.

On the other hand, there is ample evidence to sustain the finding. The appellee Morf testified:

> "I have been driving automobiles into the State of California for approximately three years, and during that time, none of my cars have ever been in an accident, nor have any of my drivers ever been arrested."

This, considering the number of automobiles imported by appellee, is eloquent of the fact that any hazard which may be created by reason of the fleet movement of more than four automobiles into the state, forms the exception, and not the rule, and amply supports the foregoing finding. Appellants have attempted to mould a few isolated instances into a broad general condition. To this effort, the District Court's answer was a finding to the contrary.

FINDING OF FACT NO. 10 [R. 38].

Not disputed.

FINDING OF FACT NO. 11 [R. 38].

Appellants' exception [R. 25] to the 11th finding is on the ground that "plaintiff's bill of complaint and the evidence show that plaintiff's occupation is principally that of transporting used motor vehicles from points where the market price is low to California where the market price is high; that such transportation is the entire basis of plaintiff's business, that the evidence shows that once plaintiff's cars arrive in California they are quickly and easily disposed of, and that the sale of such cars in Cali-

fornia is only a minor and incidental part of plaintiff's business." Appellee defies appellants to point out any portion of the record which will sustain such exceptions. To the contrary, the finding is amply supported by the evidence. [R. 60, 61, 62.]

FINDINGS OF FACT NOS. 12 AND 13 [R. 38 *et seq.*].

These findings not disputed.

FINDING OF FACT NO. 14 [R. 30].

Appellants' exception [R. 25] to this finding is that there is nothing in Chapter 402 which deprives appellee of the right to purchase and drive automobiles for the purpose of sale, or of the right of selling the same, and that the facts found in said finding, if true, are immaterial.

The evidence adduced shows that appellee makes an average net profit of from $10.00 to $15.00 on each automobile he sells. [R. 6.] It was a logical inference from this evidence that the continued imposition of the tax under Chapter 402 would deprive appellant of his profit, destroy his business and thereby effectually deprive him of the right to purchase and drive automobiles in the manner testified to, or at least destroy his ability to do so. An empty right is no right at all.

FINDINGS OF FACT NOS. 15, 16 and 17 [R. 39, 40].

Before discussing these findings, it is necessary that we make explanation relating to the record. At the trial of this cause, counsel for appellee Morf commenced proof of the facts contained in paragraphs VII and VIII of appellee's bill of complaint; Mr. Justice Stephens of the

Court interrupted, inquiring if those facts were denied. Counsel for appellants replied that those facts were admitted. For this reason appellee thereupon ceased proof of the facts alleged in paragraphs VII and VIII. In making up the record on the appeal, through an error, the stipulation aforementioned was omitted, and its omission was not discovered by counsel for appellee until a minute examination of the record was made at the time of writing this brief. Immediately upon such discovery, counsel for appellees sought and received a written stipulation from counsel for appellants that such portion omitted from the record might be included therein [Appendix A], and did immediately, pursuant to Rule 17 of this Honorable Court, file a printed motion for diminution of the record. Inasmuch as the motion is based upon a stipulation of counsel, we dare to assume that the same will be granted, and therefore do take the liberty of adverting to such stipulation and referring to the same as being a part of the record of this case, and have appended a copy thereof to this brief for the convenience of the Court.

The admission by counsel for appellants of the facts alleged in paragraphs VII and VIII of appellees' bill, in response to the query of Mr. Justice Stephens at the time of the trial, is a complete answer to appellants' exceptions to findings Nos. 15, 16 and 17.

FINDING OF FACT No. 18 [R. 40].

Although it appears that appellants "except in part" to the 18th finding [R. 26], yet in their brief (Br. 7) they state that the 18th finding, "while somewhat mixed as to findings of fact and conclusions of law, are not disputed." We, therefore, assume that appellants have abandoned this exception.

FINDING OF FACT No. 19 [R. 40].

This finding is amply supported by the evidence. [R. 60, 61, 62.]. Appellants' exception and attack on this finding is unfounded and their reasoning is certainly far-fetched.

FINDING OF FACT No. 20 [R. 40].

This finding, to which appellants object as an argumentative proposition of law, reads as follows:

> "Chapter 402, Statutes of 1935, does not contemplate or provide for the collection of the fee therein mentioned for the use, construction, maintenance or repair of the public highways. Such fee, as is specifically provided in the Act, is solely for the purpose of reimbursing the State treasury for the added expense which the State may incur in the administration and enforcement of the Act, and the added expense of policing the highways over which 'caravaning' may be conducted."

The trial court could find no other way, in our opinion, because the Legislature, in its enactment of said Chapter 402, did state, completely and definitely, the purpose for which the tax was levied. We quote from Section 6 of the Act:

> "The moneys so derived by the State are intended to reimburse the State treasury for the added expense which the state may incur in the administration and enforcement of this Act, and the added expense of policing the highways over which such caravaning may be conducted, so as to provide for the safety of traffic on such highways where caravaning is being conducted." [R. 12.]

The Act further provides:

> "All fees from the issuance of permits collected by the Motor Vehicle Department under this Act shall be paid into the general fund in the State Treasury.
>
> Said Department shall file with the Controller on or before February first and August first of each year, a detailed account of the receipts of said Department from this source for the six months next preceding."

FINDING OF FACT No. 21 [R. 40, 41].

This finding is amply supported by the evidence. The evidence shows that six men have been assigned to handle caravaning [R. 56]; they receive $170.00 to $225.00 per month each [R. 59]; that approximately 14,000 cars were imported into the state during the first eleven months of 1935 [R. 58], and during the same period appellee imported approximately 3000 of these cars. Let us compute, then, the cost of policing the highways as reflected by the evidence. Taking an average monthly salary per man assigned of $200.00, which is what the trial court did in its opinion, we have a total cost of $13,200.00 for the extra policing of the highways caused by the importation of 14,000 automobiles. This sum of $13,200.00 divided by 14,000 automobiles gives us a total cost per car of 94 cents plus. *This, entirely outside of the fact that the evidence is that if the caravaning of automobiles were stopped, these six men would not be dropped from the state payroll, but would be assigned to other duties.* [R. 53.] In the foregoing computation every intendment of the evidence has been viewed most favorably to appellants, because the witness Cato, Chief of the California

Highway Patrol, actually testified, "There are *three* men whose specific duty is the enforcement of this law; that is, since it was in effect." [R. 53.] Using the same method of computation this reduces the cost per car caused by caravaning into the state to 47 cents per car. This is upon the showing made by appellants' own witnesses only.

In attempting to bolster the tax of $15.00 per car into reasonableness the appellants refer to the testimony of the witness Bevins, "The administration expense of issuing caravan permits is about $5.00 for each permit." Appellants would have the District Court and this Court believe that the cost of issuing one permit for one automobile, a purely clerical task, is $5.00, as compared to the sum of 94 cents plus (most favorable to appellants) for the cost of policing and regulating the same automobile. The same witness adds this testimony. Referring to the registration provision of the California Vehicle Act, pertaining to private cars of the pleasure type, such as are imported by appellee, he stated that of the statutory fee of $3.00 (which also includes two license plates and two certificates), the Motor Vehicle Department is only allowed 35 percent for expenses. [R. 59.] This means that for registration, the issuance of two certificates and two license plates, the Department is operating on $1.05 per car for said purpose. Referring to a registration provision of the Motor Vehicle Act, administered by the same witness, we find that the entire cost of transferring title to a car and the issuance of two new certificates is only $1.00 [Sec. 377, Vehicle Code. Appendix C.] The mere statement that it costs $5.00 to issue a permit, which the evidence shows is issued at the border at the time of the entry of the automobile, is so prepos-

terous on its face as to make unnecessary further comment. The trial court apparently held the same view for the opinion indicates that the District Court did not believe the witness. It must be remembered that the province of judging the credibility of a witness and the reasonableness of his testimony lies exclusively with the trial court.

FINDING OF FACT No. 22 [R. 41].

The second sentence of appellants' exception to said finding [R. 27, 28] is unintelligible, for which reason appellee is unable to answer the same. The second sentence of finding No. 22 is but a continuation of findings Nos. 20 and 21, wherein it is properly found that the tax of $15.00, as is specifically provided in the Act, is solely for the purpose of administration and enforcement of the Act, and the added expense of policing the highways over which caravaning may be conducted, and that the sum of $15.00 is arbitrarily fixed and is unreasonable in amount, and that the increased cost of policing the highways caused by the movement of automobiles on their own wheels from without to within the state for the purpose of sale is comparatively small, and does not justify the excessive and unreasonable amount of the tax and would be amply met by a license fee of less than one-third the amount charged.

FINDING OF FACT No. 23 [R. 41].

This finding is objected to as an argumentative proposition of law. That the fee permits only limited movement is readily ascertained and supported by the wording of the Act itself. The balance of the finding is a direct statement of some of the terms of the Act.

FINDING OF FACT No. 24 [R. 41].

The portion of the Court's finding objected to is substantiated by the evidence showing that approximately 14,000 automobiles were transported into the state for the first eleven months of 1935 [R. 58], of which appellant brought in approximately 3000. [R. 63.]

FINDING OF FACT No. 25 [R. 41].

There is nothing in appellants' exception to this finding [R. 28] which assigns any reason for this Court to disturb it. Suffice it to say that this finding is amply supported by the evidence. [R. 60; Stipulation, Appendix A.]

FINDING OF FACT No. 26 [R. 41].

This finding is fully sustained by the evidence. The appellee Morf testified that in the period of a single month, on the average, 125 to 200 of the cars he imports, or about one-half thereof, are sold at his place of business in Los Angeles to dealers from cities such as San Diego, San Francisco and San Bernardino, all in California, and Seattle and Portland. After such sale, these cars are transported by said dealers to their respective places of business in said other cities, on their own wheels for the purpose of sale. [R. 61.] It is obvious that a large proportion of these cars are transported wholly intrastate. The witness Cato testified that he had observed some caravaning of automobiles within the State, and that at the time he joined the Department caravaning was being carried on in the State. [R. 54.] It is perfectly obvious from all of the evidence that there constantly and consistently exists within the state of California a large

and steady flow of traffic in the movement of cars intrastate over long distances of highway, upon their own wheels for the purpose of sale between many thousands of dealers. The second sentence of said finding is the statement of an ultimate fact drawn from the terms of said Chapter 402, which by definition specifically exempts movement of automobiles wholly intrastate from payment of the $15.00 tax; and the finding that no other law of California imposes a similar or other fee for such movement in intrastate commerce is nowhere challenged.

FINDING OF FACT No. 27 [R. 42].

Appellants object to this finding as being an argumentative proposition of law.

All of said finding, except the portions hereinafter quoted, are sustained by the Act itself.

We quote from said finding as follows:

> "No police problem is created by the movement of a single vehicle in such manner and for such purpose."

This is amply supported by the evidence, including the testimony of appellants' own witnesses, which shows that no police problem is created by the movement of a single vehicle into the state of California upon its own wheels for the purpose of sale. [R. 49, 50, 56, 62.]

We quote further from said finding:

> "That the movement of four vehicles or less in such manner and for such purposes constitutes no police problem."

This is fully sustained by the evidence, which specifically shows that four cars or less moved together on their own wheels for the purpose of sale constitutes no police problem. [R. 55, 56, 62.]

FINDINGS OF FACT NOS. 28, 29 AND 30 [R. 42].

These findings not disputed.

FINDING OF FACT NO. 31 [R. 42].

This finding is objected to as an argumentative proposition of law.

The trial court, having before it the statutes of the state of California relating to motor vehicles, was justified in finding that the provisions of Chapter 402, making the $15.00 fee in lieu of all other fees, is meaningless and of no benefit to plaintiff. Upon their importation into the state of California, appellee's automobiles are immediately confronted with the payment of all other privately-owned automobile taxes, and are exempt from none of them. The existence or non-existence of other statutes containing taxing provisions is a definite fact, which the trial court had an undoubted right to make the subject of its finding.

FINDING OF FACT 32 [R. 43].

The objection is that the finding is an argumentative proposition of law.

This is a finding by the trial court that the Court finds from the evidence that appellee is in such circumstances

that if Chapter 402 is enforced against him and his particular set of circumstances, it will deprive him of rights guaranteed to him under the Commerce Clause of Section 8 of Article I, and under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States.

NEGATIVE FINDING OF FACT No. 2 [R. 43].

To appellants' exception [R. 30] to this finding the answer is that the principal element of appellees' business, like that of all automobile dealers, is the purchase, barter and sale of automobiles. If appellants' theory should be entertained, it would result in a holding that any distributor of products, such as a wholesale grocer, a commission merchant, a new car manufacturer, or any of thousands of distributors of different products having their principal place of business on the rails of the transcontinental railways of the country, or upon the vast stretches of public highways over which they transport their products. All business of any magnitude is dependent upon distribution, and distribution is dependent upon interstate commerce, and the safeguards that have been thrown around interstate commerce. If appellee were running an interstate bus line and were engaged in the transportation of passengers for hire, and collected cash fares at every stop, appellants' theory might be more tenable.

NEGATIVE FINDING OF FACT No. 3 [R. 43].

The exception [R. 30] to this finding is in no way related to the finding itself. The evidence amply sustains this finding.

NEGATIVE FINDING OF FACT No. 4 [R. 43].

This finding is supported by the evidence. There is no evidence whatsoever relating to stolen cars or fraudulent registrations by persons engaged in importing automobiles on their own wheels for the purpose of sale.

NEGATIVE FINDING OF FACT No. 5 [R. 43].

Appellants' exception [R. 31] to this finding is not in point. He does not except on the ground that such cars can be moved over the highways of the state without registration or identification.

NEGATIVE FINDING OF FACT No. 7 [R. 43].

The exception [R. 31] is not germane to the issue. This finding is fully supported by the evidence and the subject thereof is discussed in our treatment of finding No. 9.

NEGATIVE FINDING OF FACT No. 8 [R. 44].

The subject matter of this finding is discussed by us in our treatment of affirmative finding No. 9, to which discussion the Court is respectfully referred.

II.

Chapter 402 Discriminates Against Interstate Commerce, and Denies Appellee the Equal Protection of the Law.

A. The Attempted Exaction by Appellants From Appellee of a Tax of $15, as Provided in Chapter 402, Before Permitting Appellee to Transport Into the State of California a Single Car, Alone, and Not in Company With Any Other Car, Upon Its Own Wheels and for the Purpose of Sale, Violates Appellee's Rights Under the Commerce Clause of Section 1, Article 8, and the Equal Protection and Due Process of Law Clauses of the 14th Amendment to the Constitution of the United States.

The trial court found that in September of 1935 appellee purchased a car in Texas and drove it to the border line of California, alone, on its own wheels, for purpose of sale. [R. 16.] It further found that appellee imports 30% to 40% of his cars into California in like manner for the same purpose, and that, in each case, the appellants demand a tax of $15.00 under Chapter 402. [R. 40, 41, 16.] The validity of the tax when applied to single cars thus imported into the state is one of the vital issues of this case. Appellants admit that this is a specific issue. (Brief 28.)

Single Car Causes No Hazard.

There is no conflict in the evidence concerning the fact that a car, driven singly and alone into California, causes no hazard on the highways. The witness Cato, chief of

the California Highway Patrol, and the official charged with the enforcement of the Caravan Act, testified:

> "In my opinion, when there are four or five cars together, it becomes a hazard." [R. 56.]

The witness Walsh testified:

> "It is possible for a single automobile to be brought in from Arizona, into California, for the purpose of sale, by itself, in the ordinary lane of traffic, and I would have no particular occasion to know that such automobile was brought into the state of California for the purpose of sale, * * *." [R. 49, 50.]

At no place in this case have appellants contended that a car driven into California singly for the purpose of sale causes any unusual hazard or police problem on the highways, or a condition other or different from that caused by a car driven alone for any other purpose. As was stated by the trial court:

> "There is nothing in the evidence that indicates any police problem resulting from the use of the highway except through fleet or caravan formation. Yet the act is specifically directed to each and every car falling within the prescribed specifications, in fleet or not, to-wit, entering California upon its own wheels and being for sale." [R. 80.]

Single cars driven into California for purposes other than sale pay no tax comparable to the $15.00 fee. The only fee provided by law to be paid on such car, is the usual registration and license fee, if the car is to be registered in California; appellee must and does pay these fees in addition to the import tax of $15.00, and an additional $3.00 registration fee, and unless he does pay these

registration and license fees he cannot sell the car. *As a matter of fact, under the Vehicle Code, this appellee is required to pay the registration and license fees on his car immediately upon arrival at the boundary line and he cannot traverse any portion of California highways until he does so.* [Sections 140, 370, 371.5, 180.5, *Vehicle Code*, Appendix C; and *Vehicle License Fee Act*, Appendix D.]

A-1. THE CARAVAN ACT DISCRIMINATES AGAINST APPELLEE, WHO DRIVES HIS CARS SINGLY INTO CALIFORNIA, NOT IN FLEET, FOR THE PURPOSE OF SALE, AND IN FAVOR OF OTHER PERSONS: (A) WHO DRIVE CARS SINGLY FROM WITHOUT TO WITHIN CALIFORNIA FOR PURPOSES OTHER THAN SALE, (B) WHO DRIVE CARS SINGLY WHOLLY WITHIN CALIFORNIA FOR PURPOSES OTHER THAN SALE.

(a) The Court can judicially notice the fact that thousands of cars are driven into California, every day of the year, singly, and by private owners, for purposes other than sale. These cars, although of the same type as appellee's singly driven cars, and operated in similar manner as appellee operates his cars (which admittedly cause no police problem), encounter no barriers when they arrive at the California state line, in the form of import duty, license fee, or tax of any kind or description, nor are they subjected to any prohibitory statute whatsoever. On the other hand, when one of appellee's singly driven cars arrives at the California line it is not permitted to enter the state until a tax is paid for it in the sum of $15.00 and a permit issued limiting its movement to appellee's place of business in Los Angeles over a specified

route. When it reaches appellee's place of business the permit is void, and appellee must register the car in his own name, secure license plates for the same, pay the registration fee (the cost of which is $6.00 instead of the usual $3.00), the license fee, and every tax of every description, and comply with every law that the privately owned car must comply with, which comes in free of the caravan tax of $15.00. As we have heretofore shown the Vehicle Code requires appellee to register his cars immediately upon entry into California and to pay all the fees required. The only difference between the privately owned car and the singly driven car owned by appellee is that when appellee's car crosses the state line, he has expressed his intention to sell it. In other words, the caravan tax is levied upon singly moved cars only when such cars constitute goods seeking their market. The intended purpose of sale existing only in the mind of the appellee, bearing no relation to the hazards, or dangers of the highway, or to the regulation or policing thereof, cannot form the basis of a valid classification for the purpose of *taxing a singly driven vehicle in interstate* commerce.

The District Court rightfully found that the avowed purpose of the Caravan Act did not contemplate or provide for the collection of the fee therein mentioned for the use, construction, maintenance or repair of the public highways, *but only to reimburse the state treasury for the "added expense which the state may incur in the administration and enforcement of the Act, and the added expense of policing the highways over which 'caravaning' may be conducted."*

The evidence clearly shows that there is no "added expense" caused by the importation into California of a single vehicle, alone, upon its own wheels, for the purpose of sale.

Appellants rely on the case of *Morf v. Bingaman*, 298 U. S. 407. This case may be readily distinguished from the case at bar. This Honorable Court in its opinion in that case at page 413, says:

> "Discrimination, if any, is between those who drive their cars to market singly and others who drive them for other purposes, and may be subjected to a different tax. Appellant does not assert that he belongs to either class. As the traffic in which he participates is properly taxed, he cannot complain of the imposition of the tax on a business which he does not do. (Citing cases.) *We have no occasion to pass upon the validity of the tax as applied to cars driven singly.*" (Italics added.)

In the instant case the evidence is uncontradicted that the appellee Morf drives into the state of California singly, and not in company with any other cars, over 1,000 cars per year, or, as he puts it, from "thirty per cent to forty per cent" of his total importation. Appellants, in the presentation of their contentions to this Court, make an attempt, in devious ways, to dodge this issue. Their principal effort, however, is spent upon their attempt to convince this Court, in the face of uncontradicted evidence and findings of the District Court to the contrary, that there is no single movement of cars, while, at the same time, they state (Brief 28), that the validity of the tax

with respect to the movement of single cars from without the state upon their own wheels, for the purpose of sale, constitutes one of the principal issues of this case.

Suffice it to say that there is a large movement of singly driven cars by this appellee into California annually, and that this Court has not decided the single car question in the case of *Morf v. Bingaman, supra,* or in any decision which we can discover up to the time of the writing of this brief.

Under all the evidence in this case, and according to the findings of the District Court, appellee is within the class of persons importing singly driven cars, in a substantial portion of his operations, and he is being discriminated against as a part of this class by appellants when they attempt the enforcement of Chapter 402 against him, and especially when they exact from him a tax of $15.00 for each car he imports singly across the California line, while on the other hand thousands of singly driven cars are permitted to enter the state for other purposes, without the same or similar burden.

(b) The Court can also judicially notice that thousands of cars are driven singly, *wholly within California* for purposes other than sale. These cars also are operated in a similar manner as are appellee's single cars (which admittedly cause no police problem). The argument in paragraph (a) hereof, applies here, except that in this instance, where the cars are driven wholly in California, by a resident of California, such car must be registered and licensed. Appellee must pay the same registration and license fees, and in addition thereto, an extra $3.00 registration fee, and the caravan fee of $15.00.

A–2. THE CARAVAN TAX DISCRIMINATES AGAINST APPELLEE IN THE INTERSTATE IMPORTATION OF HIS SINGLY DRIVEN CARS, NOT IN FLEET, IN FAVOR OF SINGLY DRIVEN CARS MOVING WHOLLY INTRASTATE, IN LIKE MANNER FOR THE PURPOSE OF SALE.

The District Court found that there is considerable transportation, wholly within the state of California, in intrastate commerce of cars on their own wheels, singly, for the purpose of sale; that under the provisions of Chapter 402 such intrastate movement of cars is not subject to the $15.00 fee, and there is no other law of California imposing a similar or other fee for such intrastate movement. [R. 41.] This finding clearly manifests the discrimination against appellee, with respect to singly driven cars imported into the state, and in favor of persons conducting a considerable intrastate movement of such cars. It is important to note here that appellee's cars, so imported, come into direct sales competition with cars driven wholly within the state for sale. Appellees, on this point, seek comfort in the case of *Morf v. Bingaman, supra*, which is clearly distinguishable from the instant case. This Honorable Court said, of the act there in question:

> "The statute applies alike to all automobiles transported for sale, whether moving intrastate or interstate."

The exact converse is of course true of the California Caravan Act, which by express definition applies only to interstate movements.

In a desperate effort to avoid this point, appellants make two contentions: (a) That there is no intrastate move-

ment of cars for sale; and (b) that there are other fees which apply to such intrastate cars. Their first contention is conclusively answered by the evidence and the findings of the District Court. Their second contention on this point is as conclusively answered by the trial court's findings and by the provisions of the California Vehicle Code, which we have heretofore discussed.

Further attempting to support their contention (a) above, appellants fancifully assume, that because appellee bought only 50 cars in California out of a total of approximately 3000, that there is no intrastate movement of cars for sale; and, that if there is it is only a continuation of the interstate movement of appellee and others in like circumstances. It is a matter of common knowledge that the reason that used car dealers, like appellee, cannot purchase used cars in California to any extent is because the new car dealer who is also necessarily a used car dealer, by virtue of his acceptance of used cars in trade, will not generally wholesale any of such cars to a strictly used car dealer, who in turn would retail them. Hence, appellee, and others, purchase in other states used cars which they wholesale to strictly used car dealers for retail purposes. When appellee Morf testified that "if the used car industry is to exist they must get used cars from without the state of California" [R. 63], he had reference to the strictly used car dealer, and not the new car dealer who also deals largely in used cars.

Appellants also forget that appellee Morf testified [R. 61], that "dealers come to Los Angeles and buy these cars, and drive them away, the same as new cars." About 2000 of appellee's cars are sold annually in this manner to dealers from cities outside of, and long distances from

Los Angeles. Appellants contend, however, that this is but a continuation of the interstate movement of such cars. Such contention is entirely without foundation. In the first place, before any of these cars are sold to said dealers, they have definitely come to rest and have become a part of the taxable personal property situated in California, and have been registered and licensed under the provisions of the Vehicle Code. [Appendix C.] By virtue of the very terms of Chapter 402 limiting their interstate movement to a definite terminus, they cannot, after coming to rest at appellee's place of business, be further moved under the terms of the permit issued under Chapter 402. Furthermore, the cars which appellee sells to said dealers immediately become their property and appellee's interest therein is terminated. They are transported within the state, not by appellee but by these dealers, by virtue of a permanent registration and license, paid for by this appellee. It is therefore plain that the movement of these cars from appellee's place of business to those of the dealers purchasing them, is an entirely new, separate, distinct and unrelated intrastate movement, and in no sense of the word, either theoretically or in practice, a continuation of the interstate movement. In addition it should be noted that the permit issued under Chapter 402 is not transferable to the new owner, and when the new owner drives the car to his place of business for resale, the caravan permit has terminated and become void. [Appendix B.]

Appellants argue in their brief (49-60) that even though the movement of cars from without the state should include a considerable number of single cars (which the evidence shows to be true) this would not invalidate the classification.

The evidence amply supports the District Court's findings that there is no police problem resulting from the use of the highways by a single vehicle driven into California on its own wheels for the purpose of sale, nor in fleet movement of such automobiles, when made up of four cars or less. [R. 38.] Appellants nowhere argue that any police problem does result from the interstate movement of a single vehicle on its own wheels for the purpose of sale, that does not result, equally, from the movement of any other single vehicle for any other purpose. They urge, however, that such vehicles must be included so that none of the offending cars, if there are any, shall escape. They then plead for the "reasonable margin" mentioned in the case of *Euclid v. Ambler Realty Co.*, 272 U. S. 365. The evidence shows and the District Court found that between 30% and 40% of appellee's cars are imported singly, and not in company with any other car. Such percentage is hardly a reasonable margin; but is, on the other hand, a large separate class, entitled to a different, and *constitutional* treatment by the Legislature.

Appellants give no valid reasons why single automobiles cannot be so constitutionally distinguished. Appellee's cars are subjected to inspection at the border, and certainly a single car can be distinguished from cars in tandem instantly. All the inspector has to do is to look at it. Appellants contend only that cars in tandem create the problem, yet they would have this Court believe that it is necessary to include the single cars in order to catch

the cars in tandem. This is so ridiculous that it does not warrant further comment.

On page 54 of their brief, appellants seek comfort in the case of *Hodge Drive-It-Yourself Co. v. Cincinnati*, 284 U. S. 335. Appellants state the holding in that case as being that single cars rented to drivers, could be subjected to license fee and safety requirements more onerous than those imposed upon private automobiles driven by their owners. Appellants go on to state that there are many points of similarity between the automobile operations classified in the *Hodge* case and the movement of single cars, not in caravan, from without the state for purposes of sale. They ask us to read the opinion of the Supreme Court of Ohio in that case for these points of similarity. We are more content to read the opinion of this Court in that case. We quote from page 337 of the opinion at which place this Court said:

> "The Court below found that the operation of automobiles by such hirers is extra-hazardous to the public."

In the instant case the trial court found [Affirmative Finding No. 8, R. 38]:

> "There is no police problem resulting from the use of the highways by a single vehicle driven into the state of California upon its own wheels for the purpose of sale, and there is no police problem created by such movement differing from the police problem created by any other movement of a single vehicle for any other purpose."

We therefore fail to see the many points of similarity in the automobile operations described in the *Hodge* case, and the instant case which are so vividly perceived by appellants. We are content to rest on the finding of the trial court in the instant case in this respect.

Appellants also rest on the *Hodge* case for another point of similarity with the case at bar. They say that in both cases the owners of the cars are using the highways for direct commercial gain as a place to conduct a private business, differing radically from ordinary uses, and subjecting the ordinary users to unusual hazards. The Court will please keep in mind that at this point, appellants refer to appellees' single car movement only. In the *Hodge* case the operation regulated was the business of owning automobiles and leasing them for compensation to be driven by the lessees on the city streets and elsewhere. This Court says at 284 U. S. 335, 337:

> "Unquestionably appellants contemplate that those hiring their cars will operate them upon the streets. In fact such use of the streets is essential to appellant's business."

We fail to see any possible connection between such described operation and the operation of appellee in his importation of a single automobile. The trial court in the instant case found as a fact that appellee's single car operation did not create an unusual hazard or police problem [R. 38], and we do not think that this Court will agree that appellee is conducting his business on the public highways of the State of California, any more than is any other distributor of any other commodity which moves in interstate (or intrastate) commerce.

B. THE ATTEMPTED EXACTION BY APPELLANTS FROM APPELLEE OF A TAX OF $30, AS PROVIDED IN CHAPTER 402, BEFORE PERMITTING APPELLEE TO TRANSPORT INTO CALIFORNIA, TWO AUTOMOBILES, ONE IN TOW OF THE OTHER, NOT IN COMPANY WITH ANY OTHER AUTOMOBILES, UPON THEIR OWN WHEELS, AND FOR THE PURPOSE OF SALE, VIOLATES APPELLEE'S RIGHTS UNDER THE COMMERCE CLAUSE OF SECTION 8, ARTICLE I, AND THE EQUAL PROTECTION AND DUE PROCESS OF LAW CLAUSES OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The argument of appellee under the single car issue is adopted under this issue, because the trial court found that the fleet movement of four cars or less does not cause any unusual hazard or police problem [R. 38].

We wish, however, to remark briefly on a matter particularly relevant to tandem car movement when not in caravan. Appellants failed to introduce any evidence showing that appellee's operation of sometimes towing one car with another, not in caravan or fleet, created any unusual hazard or police problem. As a matter of fact the Court could take judicial knowledge of the fact that there are over a half million house car trailers traveling over the highways of this nation which are much greater in size than the automobiles imported by appellee, and which create a far greater highway hazard and police problem. This trailer movement is a part of the usual traffic. The court could also take judicial notice that on the highways of California especially, there are

thousands of huge truck and trailer units, weighing many tons more than, and measuring several times the length of, the tandem car unit of appellee. Attention is especially directed to the many large tank truck and trailer units used in transporting oil from the many California oil fields and refineries such as were mentioned by the witness Cato [R. 55]. This traffic is most certainly usual and constant on California's highways. The trial court in its opinion [R. 81], took definite notice of this traffic in the following language:

> "There are single and fleet movements of cars for sale from point to point within the state, and there are other instances of troublesome use of the highways in the State of California as well as across the state lines. Instance the grouping of large vision obscuring trucks with trailers, the practice of hauling from three to five automobiles upon one long truck and trailer, and the trailer living quarters so greatly on the increase. Under the doctrine expressed in the Patisone case, such instances do not necessarily invalidate a classification. They are eloquent of the fact that the defining elements of the Caravan Act classification are not elements of the wrong aimed at and do not gather together the common malefactors but do arbitrarily and unreasonably embrace innocent actors."

The trial court, with this picture before it, could do nothing else but find that appellee's little, ordinary, pleasure type cars, one towing the other, not in fleet or cara-

van, could not possibly create an unusual traffic hazard or police problem. "Unusual" is a relative term and must be so construed.

C. The Attempted Exaction From Appellee, of a Tax of $15, As Provided in Chapter 402, When He Seeks to Import Cars Into California, in Fleet or Group Movements, on Their Own Wheels for the Purpose of Sale, Violates Appellee's Rights Under the Commerce Clause of Section 1, Article 8, and the Equal Protection and Due Process of Law Clauses of the 14th Amendment to the Constitution of the United States.

The trial court found in affirmative finding No. 9 [R. 38], that fleet movement, where made up of more than four cars causes certain traffic difficulties (enumerating them) but it also found that: *"Each and every one of these recited difficulties illustrate rare exceptions rather than rules."* The court further found in finding No. 21 [R. 40], that "The increased cost of policing the highways caused by the movement of automobiles on their own wheels from without the state of California to within the state of California for the purpose of sale is comparatively small * * * and would be amply met by a license fee of less than one-third the amount charged"; and in finding No. 22 [R. 41], the trial court found that "The unreasonableness of the license charge discriminates against the

plaintiff who brings cars into the state for sale in favor of those who deal in used cars obtained from within the state of California. The charge bears no reasonable relation to the purpose for which it is collected and in practical effect constitutes a protective tariff and is unconstitutionally burdensome." These findings are amply sustained by the evidence.

The appellants in this case have devoted all of their time and attention in an attempt to justify an outright levy of an import tax for protective tariff purposes by setting up a bogey man in the shape of imaginary hazards and police problems which they claim exist in fleet movements of automobiles. They have failed miserably in painting their dark picture. The trial court saw through the veil and perceived the true picture as reflected by the evidence. There is no more traffic violation in a fleet movement of cars than the average ratio of traffic violations in the ordinary motor traffic on California's highways. If there is, appellants were in the best position to produce definite and convincing evidence of its existence. *As it stands they succeeded only in convincing the trial court that traffic violations in fleet movements were "rare exceptions."* [Finding 9, R. 38.] The evidence shows that the drivers of cars imported in fleets reasonably comply with traffic rules and regulations and it is our earnest contention that actually no added expense is created to the state of Cali-

fornia. Appellee is glad to obey all reasonable regulatory rules which have been, or may be, promulgated for observance on the highways of California. He does strenuously object, however, to a definite excise tax inflicted under the guise of regulation under the police power of the State. It is easy to see through the scheme which was perpetrated on appellee by the 1935 California Legislature. By Chapter 402 they permitted appellee to bring his cars into California upon payment of a $15.00 tax per car, which tax had nothing to do with police power, and told him that if he paid the tax he might bring the car into California for the purpose of sale. At the same time and effective as of the same date as Chapter 402, this same Legislature passed Section 146.5 of the Vehicle Code [Appendix C], *which in effect told appellee that he could not sell the cars that he imported for the purpose of sale until they had been quarantined for a period of 90 days.* This section, of course, was declared unconstitutional by the same District Court which tried the instant case, *Asher v. Ingels,* 13 F. Supp. 654, and which court declared unconstitutional the act assailed in the case at bar. We respectfully state that we have never seen a more deliberate attempt to tax a man out of business than appellee has been confronted with in this legislative fiasco. This case is a perfect illustration of the maxim that "the power to tax, is the power to destroy."

III.

The Tax of $15 Exacted by Chapter 402 Is Arbitrary, Excessive and Unreasonable. It Is an Unconstitutional Burden Upon Appellee's Interstate Commerce and Discriminates Against Him.

This case is a flagrant example of the ever-increasing and seemingly endless effort on the part of state governments to encroach upon the right of citizens to engage in interstate commerce, free from the dangers of state economic burdens, in the guise of compensatory charges for police and safety measures, and for the use of the highways, when as a matter of fact they are actually engendered for the purpose of making the traffic difficult, if not to actually prohibit it. In the light of decisions of this Court we are confident that this Court will so express itself as to put a stop to a growing tendency, which, if allowed to continue, in our opinion, will entirely vitiate the safeguards which have been enjoyed by the citizens of this Nation since its inception.

A cross-sectional view of this case, and an examination of the statutes of California relating to motor vehicular traffic, the methods pursued by the state of California in financing the maintenance and construction of its highways, the flimsy evidence offered by appellants in justification of this tax, and the obvious inconsistencies offered in appellants' brief, in attempting to convert a definite prohibitive import tax into a seemingly innocuous compensatory charge of services rendered to this appellee, which are actually not rendered, indicates to us but one obvious con-

clusion: that every intendment and purpose of this Act is to force appellee out of business in favor of some particular class or classes of business to which his operations are particularly distasteful or competitive.

The above conclusions are not at all dependent upon guess-work or conjecture upon our part. Witness the amazing bit of testimony offered by the appellants through the witness Martland. This witness testified:

> "I appeared before the Legislative Committee relative to the passage of the law covering this subject of caravaning in March, 1935, upon the invitation of Senator Hornblower and the Motor Car Dealers Association of San Francisco." (Competitors of appellee.)
>
> "I told the Legislative Committee * * * that California automobile plants employed several thousand men and that caravaning, from an economic standpoint was very definitely a threat to local employment, in addition to which it was bringing in a number of transients * * *. My idea in representing these facts was to prevent caravaning entirely or to regulate it in a manner particularly with reference to registration and control on the highways. *The purpose was to reduce caravaning* by regulating it, as that would have been the probable effect. * * *. When the bill was first discussed, the fee was $50.00 and later cut to $15.00." [R. 56, 57.] (Italics added.)

The witness Bevins testified:

> "The caravan statute was taken from the Motor Vehicle Department of the Legislature and placed either in the Revenue and Taxation Committee or the Government Efficiency and Economy; one or the

other. Harry Riley is chairman of the Revenue and Taxation Committee. It is my recollection that the bill was finally passed out of his committee." [R. 59.]

This evidence is particularly enlightening when considered in conjunction with section 146.5 of the California Vehicle Code, which was enacted at the same session of the Legislature as was the Caravan Act. A portion of said section 146.5 [Appendix C], follows:

"Notice of Application for Registration of Vehicle Previously Registered Outside this State. * * *. No vehicle previously registered outside this state shall be registered in this state, nor shall the department issue any certificate of ownership, registration card, nor license plate or plates hereunder therefor *prior to the expiration of ninety* days from the day on which the application for registration thereof hereunder is filed with said department, * * *." (Italics added.)

This section was declared unconstitutional in the case of *Asher v. Ingels,* 13 Fed. Supp. 654, by the same District Court which tried the instant cause, excepting that Mr. Justice Curtis Wilbur, Circuit Judge of the Ninth Circuit, sat in said cause, in place of Mr. Justice Clifton Mathews. This section is hereinabove quoted in part for the purpose of showing the lengths to which the Legislature was urged and persuaded to go in a definite effort, through legislative fiat, and by unreasonable and uncon-

stitutional burdens, to entirely prohibit the interstate commerce in used cars seeking their market over the highways of the Nation, instead of over its transcontinental railroads. That the trial court saw through this thinly veiled subterfuge is apparent from the language of its opinion, as follows [R. 79]:

> "The California Legislature of 1935 legislated extensively upon the subject of motor transportation. It adopted 'The Vehicle Code' (St. 1935, p. 93) and many other acts, relating to the subject of motor transportation, including the so-called Caravan Act (c. 402, Stat. 1935), here under consideration. In Section 146.5 of the vehicle code it provided for the registration of cars previously registered outside California. This District Court sitting as a three-judge court recently declared this section unreasonable, discriminatory, and void. (Asher & Ponder v. Ingels, *et al.*, No. 8144.) Ostensibly its purpose was to prevent the importation of stolen cars into California; *actually it practically prohibited the sale of cars in California that had been registered elsewhere.* We have referred to these several acts to show that the legislature covered the subject of motor vehicle transportation comprehensively and, through separate but related acts sought to apply its legislative discretion to all conditions it deemed desirable to treat. *The purpose of each act is more easily understood and the expressed purpose in each act becomes more definitely a limitation upon its basic theory and purpose through such information.*" (Italics added.)

A. THE $15 TAX IS NOT LEVIED AS COMPENSATION FOR THE MAINTENANCE OR CONSTRUCTION OF THE HIGHWAYS.

This Court, in the case of *United States v. Goldenberg*, 168 U. S. 95, 102, 103, said:

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The Courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. *No mere omission, no mere failure to provide for contingencies,* which it may seem wise to specifically provide for, justify any judicial addition to the language of the statute." (Italics added.)

And again, in the case of *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U. S. 656, 662, 663, this Court said:

> "Statutes must be interpreted according to the intent and meaning of the Legislature, and the intention must, if practicable, be collected from the words of the Act itself; or, if the language is ambiguous, it may be collected from other Acts in *pari materia,* in connection with the words, and sometimes from the cause or necessity of the statute; *but where the language of the Act is unambiguous and explicit, courts are bound to seek for the intention of the Legislature in the words of the Act itself,*

and they are not at liberty to suppose that the Legislature intended anything different from what their language imports." (Italics added.)

The Supreme Court of California, in the case of *In Re Monrovia Evening Post,* 199 Cal. 263, 269, said:

"The intention of the Legislature must be determined from the language of the statute. (25 R. C. L. 961; *Ex Parte* Goodrich, 160 Cal. 410 [Ann. Cas. 1913 A, 56, 117 Pac. 451].)"

See, also, *Sutherland, Statutory Construction,* pp. 312, 313, section 237; 25 *R. C. L.* 961, section 217.

Appellants have abandoned their position in the District Court that the Act exists to assist in policing the highways, and in desperation attempt to support it as a fee for the privilege of using the highways, and for the maintenance and construction thereof. They urge in their brief (Br. 61-68), that the trial court "entertained an erroneous conception of the law" on this point. They quote a portion of the District Court's opinion as a basis of their contention, and then give several reasons why the trial court lapsed into this alleged error. The difficulty with appellants' argument is that they have misinterpreted the District Court's decision on this point. In this connection appellants think that the District Court held "that the use plaintiff makes of the highways does not permit the state to charge him therefor." In this appellants err. The District Court did not so hold, but instead ruled that "the use plaintiff makes of the highways is not a privilege that will support a tax *under the act* for other than such extra policing reasonably required by *fleet movement.*" (Italics added.)

The foregoing clearly shows that the District Court recognized that the state had a right to levy a compensatory tax for the maintenance and construction of highways (if reasonable and non-discriminatory), *but that it had not done so in the Act under consideration.* In arriving at its decision the District Court took cognizance of the language of the Act, to the effect that the highways should not be used without first securing the permit, and the fact that the "fee paid for any caravaning permit issued under this Act shall be *in lieu of all other registration* fees for the use of public highways in this state by motor vehicles *during the period* that such motor vehicle may be operated under and in accordance with such permit upon the public highways in this state." (Italics added.)

It should be noted that such fee is "in lieu of all other *registration fees.*"

The witness Martland testified [R. 57]:

> "My idea in representing these facts was to prevent caravaning entirely, or to regulate it in a manner *particularly with reference to registration and control of the highways.*" (Italics added.)

Clearly, then, the fee provided in the Act was not for the maintenance or construction of the highways, but, as stated by the witness Martland, and in the Act itself, for registration and regulation.

In construing this portion of the Act the District Court properly found that such provision was meaningless, *as there was no statute* requiring the payment of any fee in lieu of the $15.00 tax which appellee does not have to pay, equally with others, in addition to the $15.00 tax. Cer-

tainly appellants did not cite any statute requiring the payment of such a fee (to which appellee is not equally subject) to the District Court, nor do they cite this Court to any such statute. The reason is obvious; there is none.

In a further effort to support their now new position, appellants cite and rely upon the case of *Morf v. Bingaman,* 298 U. S. 407. Unlike the statute in that case, the California Caravan Act, by apt and specific language, clearly expresses its purpose in Section 6. [Appendix B.]

It is eloquent in this case that appellants went to great lengths to produce evidence to show the additional cost of "policing" the highways and the costs of administration caused by so-called "caravaning," but that there is not one iota of evidence in the record concerning the cost of "maintenance or construction" of the state's highways. This is plainly an indication that appellants have never seriously contended that the Act was intended for the "maintenance" or "construction" of the highways.

Right here appellee wants to list for this Court the taxes *he is required to, and does, pay upon each of his cars.*

1. $15.00 under Chapter 402. [Appendix B.]

2. $3.00 registration fee under Section 370 of the Vehicle Code. [Appendix C.]

3. $3.00 additional registration fee under Section 371.5 of the Vehicle Code. [Appendix C.]

4. $1.75 per $100.00 valuation under the provisions of Section 2 of the Vehicle License Fee Act. [Appendix D.]

5. Gasoline tax of 3 cents per gallon. [Appendix F.]

6. In addition, appellee, a resident of California, pays other property taxes and business license taxes.

In other words, appellee pays, on each car, $18.00 more than is paid upon a like vehicle, irrespective of the use to which such other car is put. *In addition, the other car, though paying $18.00 less, is entitled to the free use of the highways, without restriction as to route or time, whereas appellee is limited to certain specified routes* (always to his place of business in Los Angeles), *and not to exceed a period of 90 days.*

We do not believe that appellants will deny that appellee must and does pay all the above taxes.

We do not think that the wording of the statute, as particularly contained in Section 6 thereof, leaves any doubt as to the purpose of the $15.00 tax. Although appellants recommend to this Court that the words of purpose, as contained in Section 6, be lifted bodily from the Act and be disregarded, we do not believe this Court will adopt such a view. Suffice it to say that appellants' argument in this regard presents a novel method of statutory construction. At least it is new to us. We feel that the purpose of the Act and of the $15.00 tax levied thereunder must, if possible, be gleaned from the four corners of the Act itself. This is a fundamental principle of statutory construction. It is only where the wording of the statute leaves the purpose in doubt that other methods of determining its purpose are permissible. *Should this Court, however, feel that additional light should be shed upon the purpose of the $15.00 tax, other than the wording of the Act itself, we desire to call attention to some features of this case which then become germane to this issue.*

The State of California has provided, by existing law, no method for using, nor has it used, nor does it now

use, the $15.00 fee, or any part thereof, collected for each car imported by appellee into the State, for the purpose of highway maintenance and construction. By express provision of Chapter 402, the whole of the $15.00 tax is paid into the General Fund of the State Treasury. [R. 11.] It is not appropriated by the provisions of Chapter 402, to the maintenance or construction of highways, and as a matter of fact it is not appropriated to any use by said Act. The state of California does not maintain or construct its highways out of any appropriations out of the General Fund and it is a matter of statutory record that since the first $15.00 was exacted from this appellee and since the time that Chapter 402 became effective against any person no appropriation has been made by the Legislature of the state of California from the General Fund for the purpose of highway maintenance or construction. The fiscal policy of the state of California is not so arranged that monies intended for highway regulation, maintenance and construction, are placed into the General Fund at all. Other special funds are specifically provided for this purpose, as will be hereafter noted, and it is our serious contention that the Legislature of 1935, knowing well the fiscal policy of the State, and further, attempting at the same time, to legislate broadly with respect to motor vehicle legislation, directed that the $15.00 tax go into the General Fund of the State, *because it did not intend the $15.00 tax to be spent upon highway maintenance or construction.* The fact that the Legislature, in enacting Chapter 402, in Section 6 thereof, stated the purpose of the $15.00 tax, and did not mention as a part thereof, that the money was to reimburse the state for the use, maintenance or construction of the highways, coupled with the fact that

it did not direct the money so collected to be paid into the fund provided as the depository for monies intended to be expended for maintenance and construction of highways completely forecloses, in our opinion, any doubt upon this question. *Further, no part of the cost of highway maintenance or construction is paid by the state from the proceeds of a general property tax.* It is therefore obvious that the Legislature thought it was empowered to, and it did intend to, levy against appellee an occupational tax of $15.00 per car for the privilege of carrying on a purely interstate business, basing the tax upon the extent of such business, although it is well settled that the privilege of carrying on a purely interstate business is not one which the state is empowered to tax. Attention is especially directed to the opinion of this Court in *Morf v. Bingaman*, 298 U. S. 407, wherein appear these words:

> "Nor is it important that a part of the fees collected is not devoted directly to highway maintenance, *the cost of which the State pays in part from the proceeds of a general property tax.* The use for highway maintenance for a fee collected from automobile owners *may be of significance,* when the point is otherwise in doubt, to show that the fee is in fact laid for that purpose and is thus a charge for the privilege of using the highways. Interstate Transit v. Lindsey, 283 U. S. 183, 75 L. Ed. 953, 51 Sup. Ct. 380." (Italics added.)

The attention of the Court is respectfully invited to the unusual situation which appellants have developed. They say that the Court shall not give heed to the wording of the Act in determining the purpose of the $15.00 tax. Then after lifting bodily from the Act its words of purpose from Section 6, which process would then, in our

opinion, leave the purpose of the Act in doubt, appellants immediately proceed to blithely tell this Court, in their brief (64), that this Court has no right to judge the purpose of the Act from the fact that the $15.00 tax goes into the General Fund. In the case of *Interstate Transit v. Lindsey,* 283 U. S. 183, cited by this Court in the above quotation from *Morf v. Bingaman, supra,* this Court said at pages 188, 189:

> "The conclusion that the tax challenged is laid for the privilege of doing business and not as compensation for the use of the highways is confirmed by contrasting Section 4 of the 1927 Act with those statutes *which admittedly provide* for defraying the cost of constructing and maintaining highways and regulating the traffic thereon. The former declares specifically in connection with the privilege tax on interstate busses that the proceeds 'shall go and belong exclusively to the general funds of the state,' on the other hand, in the legislation which Tennessee has provided for defraying the cost of constructing and maintaining the State highways and regulating motor traffic *it has been the consistent practice* to prescribe that monies raised for this purpose shall be segregated and go into the Highway Fund. The present system of motor regulation was inaugurated in 1915. At the same session, the Legislature created a State highway commission with power to construct and maintain highways. In these statutes, and in many later ones, prescribing additional fees for the *registration* and licensing of motor vehicles, imposing gasoline taxes, laying a one-mill road tax, and authorizing the issue of bonds for the construction of highways and bridges the Legislature provided that the proceeds of the fees, taxes, and bonds,

> and of the tolls collected on bridges, should be set apart as State Highway and Bridge Funds to be expended by the Commission exclusively for the construction and maintenance of highways or bridges. The absence in Section 4 of this provision, which characterizes almost every other Tennessee statute relating to the construction and maintenance of highways or the regulation of motor vehicle traffic, *is additional evidence* that the present tax was not exacted for such purposes, but merely as a privilege tax on the carrying on of interstate business." (Italics added.)

The instant case is identical with the case of *Interstate Transit v. Lindsey* on the point here under discussion. As was true in that case, so also in the case at bar. In the legislation by which California has provided for defraying the cost of constructing and maintaining the state highways *and regulating motor traffic,* it has been the consistent practice to prescribe that monies raised for such purposes shall be segregated and go into certain special funds devoted solely to highway maintenance, construction and regulation, *and no part thereof is paid by a property tax or from the General Fund.* For many years past California has maintained special funds in the State Treasury for the purpose of defraying the expenses of maintenance, construction and regulation of public highways. In 1935 (the same session at which Chapter 402 was enacted) the Legislature adopted the Streets and Highways Code. [Statutes 1935, Chapter 29; Appendix G.]

This was a codification of many prior general laws relating to streets and highways, which were repealed upon codification. Article 5, Chapter 1, Division 1, of the Code, is entitled: "Funds for Highway Purposes—Sections 180-204." [Appendix G.]

Section 180 thereof provides that the "State highway general fund in the State Treasury is continued in existence." Section 181 provides for the expenditure of money from such fund. Section 182 provides that, "The 'State Highway Fund' in the State Treasury is continued in existence. The State Highway Fund is the successor to the State highway maintenance fund and the State highway construction fund, . . ." Section 183 provides as follows:

> "Deposit of money in Fund. Appropriation. With the exception of money authorized by law to be deposited in the State highway general fund, *all money available* for the acquisition of real property or interests therein for State highways, *or for the construction, maintenance or improvement of State highways* or highways in State parks shall be deposited *in the State highway fund.* The moneys in said fund are appropriated and shall be allocated and expended for the purposes and in the manner provided in this code." (Italics added.)

In 1923 the Legislature adopted the "Motor Vehicle Fuel License Tax Act." [Statutes 1923, p. 571; Appendix F.] This Act was amended by every Legislature since its adoption, including the 1935 Legislature. Under Section 13 of said Act all money received from the State Controller from motor vehicle fuel license taxes (commonly termed gasoline tax), shall be deposited in the Motor Vehicle Fuel Fund in the State Treasury.

Portions of this money are appropriated, by the express provisions of the Act, to the State Controller, and State Board of Equalization, for administration expenses. After the biennial appropriations to the State Controller and the State Board of Equalization for administrative purposes and after the payment of all refunds, one-third of the net residue is appropriated to all the counties of the state in certain specified proportions to be paid into a "Special road improvement fund" in each county, and expended as provided by law. *All the net remainder shall be paid by the State Treasurer into the "State Highway Fund," which fund is by this Act created.* Said Section 13 also provides that:

> "All money thus paid into the State Highway Fund is appropriated to the Department of Public Works to be expended in accordance with law for the payment of all necessary charges incurred in carrying out the provisions of the Street and Highway Code, and of any other law relating to the acquisition of real property for *and the construction, maintenance or improvement of highways.*" (Italics added.)

At the same 1935 session, the Legislature adopted the Vehicle License Fee Act. [Statutes of 1935, Chapter 362; Appendix D.] Section 2 of said Act provides that a "license fee is hereby imposed for the privilege of operating in this state any vehicle." It further provides that the annual fee shall be "a sum equal to one and three-quarters per cent of the actual market value of such vehicle," and Section 9 provides that "all moneys collected by the Department of Motor Vehicles under the terms of this Act shall be reported daily to the State Controller and at the same time deposited in the State Treasury *to*

the credit of the Motor Vehicle License Fee Fund, which fund is hereby created." The moneys in said fund are hereby appropriated as follows:

> "(a) One per cent, or so much thereof as may be necessary *for the use of the Department of Motor Vehicles in the enforcement of the provisions of this Act.*" (Italics added.)

Then it is provided, after certain payments to cities, cities and counties, and counties, that, of the balance of the moneys in said fund, a sufficient sum shall be set apart from the principal and interest paid, or necessarily to be paid during the 87th and 88th fiscal years on the bonds of the state issued under authority of certain State Highway Acts and the Constitution of California. (All of which bonds are highway bonds.)

The 1935 California Legislature also adopted "The Vehicle Code." [Appendix C.] Under this code, when appellee imports a car into California, upon its arrival at his place of business at Los Angeles (though the Vehicle Code requires payment at the border), and before it is sold, or moved again upon the state highway, appellee must, and he does, register the car in his own name, paying the motor vehicle registration fee of $6.00 provided in the Act, and the "Vehicle License Tax" of $1.75 on each $100.00 of valuation as determined by the Department of Motor Vehicles. This is an immediate contribution by every car imported by appellee to the maintenance and construction of state highways; to the expense of administration of the motor vehicle laws of the State, including administration and salary expense of the California Highway Patrol, which is the policing agency of the highways of the state of California. This car escapes none of the expenses to which every other automobile in the

State contributes, and is charged an additional registration fee of $3.00. *There is no exemption!* And, further, this car does not enjoy any other or different privileges than does the ordinary automobile bearing foreign licenses and registration, which is not for sale as it crosses the state boundary. We can find no law granting appellee any such privilege, and certainly appellants cite no such law. If the foreign car is not for sale it may enter the state without tax, and if it is desired to register it in California it may travel to Los Angeles over the same highway, without charge, burden or interference.

When appellee registers his car, pays the registration fee, and the license fee (not the caravan fee), the money goes into the Motor Vehicle Fund. Not exceeding 35 per cent of this fund is appropriated to the maintenance of the Motor Vehicle Department and the necessary expenses in carrying out the provisions of the Vehicle Code, and in enforcing all laws regulating the operation of vehicles for the use of the State's highways. The balance of the Motor Vehicle Fund (known as "Net Receipts") is appropriated one-half to the counties of the state in certain proportions and the other one-half of the "Net Receipts" is appropriated into the "State Highway Fund." [Sections 776-781, Vehicle Code; Appendix C.]

With a complete machinery set-up, and a definite fiscal policy established by the Legislature at the very same time as the enactment of the Caravan Act, and with the Legislature declaring that "all money available for the acquisition of real property or interests therein for state highways, or for the construction, maintenance or improvement of state highways, or highways in state parks shall be deposited in the State Highway Fund" [Appendix E], if the Legislature intended that this $15.00 tax

on appellee should be used to maintain or construct highways, why did they not direct, in Chapter 402, such provisions as would finally put the money into the State Highway Fund? Or if the Legislature intended that appellee's $15.00 should go to construction and maintenance of the highways and also to the policing and regulation of the highways, why did they not direct, in Chapter 402, that the money be paid into the Motor Vehicle Fund where 35 per cent of it would go to the regulation and policing of the highways and the balance of 65 per cent would find its way to the county highway funds and the State Highway Fund for the construction and maintenance of the highways?

From the foregoing, it is plain that if Chapter 402 has any valid purpose it is that purpose ascribed to it by the finding of the trial court. [R. 40.] The trial court further found that, viewed in the light of such purpose the $15.00 tax was arbitrary and unreasonable in amount. [R. 40.]

While appellant relies on *Morf v. Bingaman,* 298 U. S. 407, on this point, that case is easily distinguishable from the case at bar.

First: as to the amount of the tax. The tax in *Morf v. Bingaman* was $7.50 for a single car, and $5.00 for the towed car. The trial court in that case found the tax to be reasonable, while in the instant case, the trial court found the $15.00 tax unreasonable, excessive and arbitrary.

Second: In *Morf v. Bingaman* the reasonableness of the fee with respect to singly driven cars, alone, not in fleet, was not involved and the finding of the trial court, as well as the decision of this Court, as to the reason-

ableness of the fee was predicated solely upon the tax when applied to fleet or group movement of cars. This Court said in *Morf v. Bingaman, supra:* "We have no occasion to pass upon the validity of the tax as applied to cars driven singly." It has been made apparent that the reasonableness of the tax in the instant case, when applied to a single car movement, presents features which were not involved in *Morf v. Bingaman.*

Third: The payment of the tax involved under the New Mexico statute in *Morf v. Bingaman, supra,* placed no restrictions upon time, or routes traveled in the state, while in the instant case the statute definitely restricts and limits appellee to "the trip or trips to be specified in said permit," and in time, in no event beyond ninety days.

Fourth: The taxes collected under the New Mexico Act found their way into funds devoted to highway construction, maintenance, regulation and administration expenses. As appears heretofore, none of the $15.00 tax in the instant case is devoted to highway purposes of any kind or nature.

Fifth: In the *Morf v. Bingaman* case, the evidence showed that appellee's cars crossing the highways of New Mexico did not come to rest within that state, but were destined for delivery in California; therefore, they never became personal property taxable as such in New Mexico, and contributed nothing to highway taxes, other than the caravan tax. The converse is true in the case at bar, wherein appellees' cars, after the exaction of the $15.00 tax, come to rest within the state, acquire a situs for the purpose of taxation and immediately pay like taxes and usual charges levied against all other cars (also additional registration fee of $3.00).

IV.

The California Highway Carriers Act Does Not Apply to Appellee.

Appellants in their brief (81-85) admit that the Highway Carriers Act [Appendix G] does not apply to appellee, except in the following particulars, (1) the requirement of a permit (which will be granted appellee upon request without cost) and (2) the liability insurance requirement of said act. In this, we feel, appellants are in error. Section 1, paragraph (f), defines the term "highway carrier" as follows:

> "The term 'highway carrier' when used in this act means every corporation or person, their lessees, trustees, receivers or trustees appointed by any Court whatsoever engaged in transportation of property for compensation or hire as a business over any public highway in this State by means of a motor vehicle or motor vehicles. However, it does not include . . ., *nor does it include persons hauling their own products.*" (Italics added.)

The Court found [R. 42] that "the plaintiff is not a common carrier, accepts no article for transportation for hire, and transports only his own property." Appellants in their brief do not dispute this finding. [Br. 7.]

Section 3 of said Highway Carriers Act provides that

> "*no highway carrier,* . . . shall engage in the business of transportation of property for compensation by motor vehicle on any public highway in this state without first having obtained from the Railroad Commission a permit authorizing such operation." (Italics added.)

Section 5 provides that

> "The Railroad Commission shall, in granting permits under the provisions of this act, require the

> *highway carrier* to procure, . . . adequate protection, as required in Section 6 hereof, ..." (Italics added.)

It will thus be seen that appellee is definitely excluded from the definition of the term "Highway Carrier" as defined in the Highway Carriers Act, hence when provisions are made for a "highway carrier" to procure a permit, or obtain "adequate protection" in the form of liability insurance, *appellee is expressly excluded.*

Appellants urge, however, that the provision contained in Section 1 of Chapter 402, that

> "The caravaning of motor vehicles as herein defined shall be considered as the transportation of property for hire by motor vehicle and shall be subject to all the laws of this state relative to the transportation of property for hire by Motor Vehicle upon the public highways of this state,"

places appellee within the definition of a "highway carrier" as defined in the Highway Carriers' Act, and subjects him to all the burdens thereof, other than the $25.00 fee which does not apply. To this we answer that the Legislature cannot, by legislative fiat, make appellee assume the status of a "transporter for hire." As said by the District Court: "if the law attempts to fix upon plaintiff a status not justified by the facts, it goes beyond the power of the Legislature and is to that extent void as to him. *Frost Trucking Co. v. R. R. Com.*, 271 U. S. 583." [R. 82, 83.] While it does not appear in the record it is a fact that appellants have not, since the institution of this action, requested or demanded that appellee have a permit or deposit with the Railroad Commission a policy of liability insurance. It is also true, though not appearing in the record, that appellee does carry such insurance.

V.

The $15.00 Tax Required Under Chapter 402, Is An Import Tax.

Section 1 of Chapter 402 defines caravaning as follows:

> "The term 'caravaning' as used in this act shall mean the transportation from without the State of any motor vehicle operated on its own wheels, or in tow of another motor vehicle, for the purpose of selling or offering the same for sale to or by any agent, dealer, manufacturers' representative, purchaser, or prospective purchaser, whether such agent, dealer, manufacturers' representative, purchaser or prospective purchaser may be located within or without the State."

This is the only definition in the Act defining "caravaning." Nowhere in said definition is the use of the highways mentioned. The evil which the Act attempts to regulate is contained in the above definition and at no other place and in no other words, and the real evil is contained in the words "transportation from without the State * * * for the purpose of selling or offering the same for sale * * *." *These words define but one thing, and that is, an import tax.* Let us analyse this factor in conjunction with another law of the state. When appellee arrives at the California border line with a motor vehicle owned by him, registered in another state, he arrives in this position: He is a resident of Los Angeles, California; is the owner of the automobile and the automobile is registered in his name in another state. Under the provisions of the Vehicle Code he is not entitled to drive this automobile on even one foot of California highway unless and until he registers this car in California and pays $6.00 registration fee and a license tax of $1.75 for each $100 valuation. Please note that he is not entitled to drive

this car under a nonresident permit because he is not a nonresident owner. He is a resident owner.

Now immediately upon registering the car in California in his own name, and paying the registration fee and license tax, he has paid to use the highways of the state of California for the balance of the calendar year, but he must do this under the Vehicle Code before this car traverses an inch of California highway; therefore, the $15.00 caravan tax can be nothing else than a tax for the privilege of importing this car into California. It can be nothing else because the Vehicle Code provides the sole method and manner and time for the payment by appellee for his privilige of using the highways of California. Having provided this method, and fixed the amount and the time, and having in effect stated that upon compliance therewith appellee's car shall be permitted to use the highways of California for the balance of the calendar year, there remains no other reason for the collection of $15.00 than the fact that when the car arrives at the border it is for sale.

That this $15.00 tax is an import tax is further borne out by the fact that if appellee, demands and receives, at the border, upon the payment of the $6.00 registration fee, and the $1.75 per $100.00 license tax, California registration and plates (which appellee is required to do and does pay in Los Angeles, less than a day after the car is at the border) he could then have unlimited use of the highways, without restriction to route or time. The $15.00 caravan tax is therefore plainly a tax upon importation, for what difference does it make if the registration and license fees are paid at Los Angeles, or at the port of entry? *Appellants have a right to demand payment at either place.*

VI.
Authorities.

The law of this case governs alike, in the main, all of appellee's operations hereinbefore separately analyzed. The well-settled pronouncements of this Court which are germane to the issues heretofore discussed should, in our opinion, be treated collectively at this point. This we proceed to do.

The decisions of this Court do not leave in doubt the rights of the several states with respect to the exclusive power vested in Congress by Article I, section 8, of the Constitution, to regulate commerce among the several states, and they are equally clear with reference to the inhibitions imposed upon the states by the Equal Protection and Due Process clauses of the Fourteenth Amendment to the Constitution.

Under the Commerce Clause, the principle has long been recognized that a state may legislate with respect to inspection laws and similar police regulations, local rather than national in character. With specific relation to special facilities furnished by the states, and used as well by interstate as by intrastate commerce (such as highways), it is now recognized by settled precedents that compensation by way of taxation may be exacted by the state from the various classes of motor vehicular traffic using its highways. Where such taxation, however, is directed to and levied upon persons engaged in interstate, as distinguished from intrastate, commerce, the valid limits thereof have been unalterably and clearly defined.

Such taxation will be held to be invalid and unconstitutionally burdensome on interstate commerce, unless:

1. It is reasonable in amount.

2. It does not discriminate against interstate commerce.

3. It is levied only as compensation for the use, maintenance and construction, or policing and regulation of the highways (plus reasonable administrative cost), and is based upon the use made, or to be made, of the highways.

Should the tax fail to meet *any one* of the above requirements, it is an unreasonable burden and obstruction to interstate commerce, or a violation of the equal protection clause, and must be held unconstitutional.

This Honorable Court, in the case of *Interstate Transit v. Lindsey*, 283 U. S. 183, speaking through Mr. Justice Brandeis, said:

> "While a state may not lay a tax on the privilege of engaging in interstate commerce (Sprout v. South Bend, 277 U. S. 163, 72 L. Ed. 833, 62 A. L. R. 45, 48 S. Ct. 502), it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon. (Citing cases.) As such a charge is a direct burden on interstate commerce, the tax cannot be sustained *unless it appears affirmatively*, in some way, that it is levied *only as compensation* for use of the highways or to defray the expense of regulating motor traffic." (Italics added.)

Further, at page 190:

"Being free to levy occupation taxes, states may tax the privilege of doing an *intrastate* bus business without regard to whether the charge imposed represents merely a fair compensation for the use of their highways. . . . . But since a state may demand of one carrying on an *interstate* bus business only fair compensation for what it gives, *such imposition, though termed a tax, cannot be tested by standards which generally determine the validity of taxes. Being valid only if compensatory,* the charge must be necessarily predicated upon the use made, or to be made, of the highways of the state. Clark v. Poor, 274, U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702, *supra. In the present act the amount of the tax is not dependent upon such use.* It does not rise with an increase in mileage traveled, or even with the number of passengers actually carried on the highways of the state. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. *Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use,* to justify the holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses. We need not therefore consider whether the tax exacted from this appellant is unreasonably large or unjustly discriminatory." (Italics added.)

We have taken the liberty of a full quotation from the foregoing case, as we feel that it sets forth a clear and concise exposition of the elements which are necessary to

the existence of a valid motor vehicular tax affecting interstate commerce. The other cases decided by this Court are to the same effect; among these cases we cite the following:

Hendrick v. Maryland, 235 U. S. 610;

Sprout v. South Bend, 277 U. S. 160;

Kane v. New Jersey, 242 U. S. 160;

Clark v. Poor, 274 U. S. 554;

Sproles v. Binford, 286 U. S. 374;

Michigan Pub. Utilities Com. v. Duke, 266 U. S. 570;

Buck v. Kuykendall, 267 U. S. 307;

Morf v. Bingaman, 298 U. S. 407;

Interstate Busses Corp. v. Blodgett, 276 U. S. 245;

Morris v. Duby, 274 U. S. 135;

Continental Baking Co. v. Woodring, 286 U. S. 352;

Hicklin v. Coney, 290 U. S. 169;

Aero Mayflower Transit Co. v. Georgia Pub. Serv. Com., 295 U. S. 285.

1. ALL OF THESE CASES ARE IN AGREEMENT ON THE POINT THAT, IF THE TAX IS EXCESSIVE OR IN AN AMOUNT UNREASONABLY LARGE, IT MUST BE DECLARED UNCONSTITUTIONAL.

In the recent case of *Morf v. Bingaman, supra,* this Honorable Court said, concerning this element of the tax:

> *"It is not shown to exceed a reasonable charge* for the privilege and for defraying the cost of police regulation of the traffic involved, . . ."

And, further:

> ". . . the levy of a flat fee *not shown to be unreasonable in amount,* . . . . is not a forbidden burden on interstate commerce." (Italics added.)

The Court further said of the tax, that it was one "whose only effect, even when applied to interstate traffic, is to enable the state to police it, and to impose upon it a *reasonable charge, to defray the burden* of this state expense, and for the privilege of using the state's highways." (Italics added.)

In *Kane v. New Jersey, supra,* it is said that "the amount of the fee is not so large as to be unreasonable."

In *Michigan Public Utilities Com. v. Duke, supra,* the Court, speaking through Mr. Justice Butler, said, on this point:

> "This court has held . . . . that a *reasonable,* graduated license fee, imposed by a state on motor vehicles used in interstate commerce, does not constitute a direct burden on interstate commerce, and that a state which, at its own expense, furnishes special facilities for the use of those engaged in intrastate and interstate commerce, may exact *compensation* therefore, and *if the charges are reasonable* and uniform, they constitute no burden on interstate commerce." (Italics added.)

Mr. Justice McReynolds, in delivering the opinion of the Court in *Hendrick v. Maryland,* probably the first important decision of this Court dealing with the subject, at three separate portions of the opinion refers to the reasonableness in amount which is required of such taxes. At one of these places, he says: "The reasonableness of the

state's action is always open to inquiry in so far as it affects interstate commerce, . . ." and he states that the fees constitute no burden on interstate commerce "so long as they are reasonable."

In *Interstate Busses Corp. v. Blodgett, supra,* Mr. Justice Stone said of the fee, in delivering the Court's opinion:

> "there is no evidence that the tax here is in itself *an unreasonable charge for the privilege.*" (Italics added.)

As one of the determining factors in its decision, the Court, speaking through Mr. Justice Cardozo, in *Aero Mayflower T. Co. v. Georgia Pub. Serv. Com., supra,* held:

> "The fee is moderate in amount."

In *Clark v. Poor, supra,* we find the following:

> "Nor is it suggested *that the tax is so large* as to obstruct interstate commerce."

And further:

> ". . . the tax is . . . not objectionable in amount, . . ." (Italics added.)

In *Sprout v. South Bend, supra,* Mr. Justice Brandeis delivered the opinion of the Court, wherein it was held that it did not appear that the amount collected under the ordinance was no more than was reasonably required for such a purpose, and the fee was held invalid for said reason, among others. The Court there said:

> ". . . and that a license fee *no larger in amount than is reasonably required to defray the expense of administering the regulations may be demanded.*" (Italics added.)

From the above cases, it is made to appear most decisively that, if the fee levied by the type of statute here under discussion is excessive or unreasonably large in amount, the tax must fall by reason of being an unconstitutional burden on interstate commerce, *and this defect alone is sufficient to condemn the Act.*

2. Even Though Reasonable in Amount, the Tax Must Fall if It Discriminates Against Interstate Commerce in Any Respect.

This requirement is as well established as the one previously discussed, and none of the cases dealing with the subject fail to mention the necessity of it.

Thus, in *Morf v. Bingaman, supra,* the court said:

> "The statute applies alike to all automobiles transported for sale, whether moving intrastate or interstate." And the court further mentions that the charge is such as the state may impose "if non-discriminatory".

It was said of the fee in *Aero Mayflower Transit Co. v. Georgia Pub. Serv. Com., supra,*

> ". . . it is exacted without hostility to foreign or interstate transactions, being imposed also upon domestic vehicles operated in like conditions."

The court, in *Sprout v. South Bend, supra,* said:

> "It is true that, in the absence of Federal legislation covering the subject, the state may impose, even upon vehicles using the highways exclusively in interstate commerce, *non-discriminatory regulations* for the purpose of insuring the public safety and convenience; . . ." (Italics added.)

"Of course, the state may not discriminate against interstate commerce." Morris v. Duby, 274 U. S. 135, 143.

Without multiplying examples, it becomes apparent that the second requisite of valid legislation of this type is the total absence of discrimination against interstate commerce, as such discrimination violates the inhibitions against denying the equal protection of the laws, as well as the Interstate Commerce Clause.

3. IT MUST BE MADE TO APPEAR, BY REASONABLE CONSTRUCTION OF THE ACT, AND BY APPLYING THE SETTLED PRINCIPLES RELATING TO CLASSIFICATIONS PERMITTED UNDER THE EQUAL PROTECTION CLAUSE, THAT THE TAX IS LEVIED, EITHER TO COMPENSATE FOR THE USE, MAINTENANCE OR CONSTRUCTION OF THE HIGHWAYS, OR THE POLICING AND REGULATION THEREOF, AND, FURTHER, THAT THE TAX ADOPTED, AND THE TERMS OF THE ACT AS A WHOLE, BEAR A REASONABLE, SUBSTANTIAL, AND REAL RELATION TO THE OBJECT TO BE ACCOMPLISHED, I. E., REGULATION OR COST OF FACILITIES FURNISHED.

It is under the above rule that many enactments, conceived for the purpose of destroying, harassing, burdening and impeding legitimate interstate commercial transactions, and enacted under the guise of police power or compensatory statutes, have been declared unconstitutional and void, by reason of the fact that the terms thereof bore no just and reasonable relation to the use, regulation or administration of the highways.

It was such an objectionable statute as was held unconstitutional in *Interstate Transit v. Lindsey, supra.* There,

the court, after a careful analysis of the terms and objects of the act, held that there was no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways. The act was therefore held unconstitutional, upon that ground, the court expressly stating that it was unnecessary for such reason even to measure the validity of the tax by the other two requirements we have referred to. The court said, "We need not therefore consider whether the tax exacted from this appellant is unreasonably large or unjustly discriminatory."

In *Buck v. Kuykendall,* 267 U. S. 307, the Court again declared a "use of highways" tax unconstitutional, for similar reasons, the Court saying:

> "It may be assumed that section 4 of the state statute is consistent with the 14th Amendment; and also, that appropriate state regulations, adopted primarily to promote safety upon the highways and conservation in their use, are not obnoxious to the commerce clause, where the indirect burden imposed upon interstate commerce is not unreasonable. (Citing a case.) *The provision here in question is of a different character.* Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the *prohibition of competition.* It determines not the manner of use, but the persons by whom the highways may be used. *It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner."* (Italics added.)

While it is only necessary, in order to hold the tax invalid where applied to interstate commerce, that it fail to measure up to any one of the requirements above treated, it should be kept in mind that the District Court in the instant case held the California Caravan Act unconstitutional for *failure to comply with any one of them.* Under the holding of the trial court, not only did the said act fail to bear any reasonable relation to the alleged objects thereof, with respect to highway purposes, but the said Act unfairly discriminated against appellee's interstate commerce in several respects, and, by definite finding, the fee was held unreasonably large and excessive in amount.

By reason of the foregoing cases, it is plain that the Caravan Act is an unconstitutional burden on appellee's interstate commerce. The cases are equally well settled which forbid states to unreasonably burden, tax, hinder, or discriminate in any manner against interstate commerce.

A state may not lay a tax upon the privilege of engaging in interstate commerce.

The above rule is accurately expressed in the case of *Cooney v. Mountain States Tel. & Tel. Co.,* 294 U. S. 384, 392, as follows:

> "But a state cannot tax interstate commerce, it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it."

By virtue of the above cases and many others of similar import, the Caravan Act cannot be sustained as an occupation tax upon appellee's right to engage in an inter-

state business, although some of the comments in appellants' brief would lead to the conclusion that they attempt to justify it on such a basis.

> "Thus, the States cannot tax interstate commerce, either by laying a tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it. Similarly, the States may not tax property in transit in interstate commerce."
>
> *Minnesota v. Blasius,* 290 U. S. 1, 9.

To the same effect, see:

Sprout v. South Bend, supra;

West v. Kansas Natural Gas Co., 221 U. S. 229;

Voight v. Wright, 141 U. S. 62;

Welton v. Missouri, 91 U. S. 275;

I. M. Darnell & Son Co. v. Memphis, 208 U. S. 113;

Walling v. Michigan, 116 U. S. 446;

Webber v. Virginia, 103 U. S. 344.

Neither the police power nor the taxing power may be so used as to violate the rights of those engaged in interstate commerce.

As stated by Mr. Justice Cardozo in *Baldwin v. Selig,* 294 U. S. 511:

> "Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against com-

petition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog on the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result."

The court further said:

"The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended."

See, also:

Real Silk Hosiery Mills v. Portland, 268 U. S. 325;

Minnesota v. Barber, 136 U. S. 313;

Brimmer v. Rebman, 138 U. S. 78;

Sonneborn Bros. v. Keeling, 262 U. S. 506.

By reason of the several unreasonable discriminations against appellee which we have heretofore shown to exist, the enforcement of the Caravan Act has resulted in denying to the appellee the equal protection of the laws, and by the exercise of an invalid taxing power, in depriving him of his property without due process of law. The decisions of this Honorable Court by which it has construed the meaning and application of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution are adverted to at this place. By a lengthy line of decisions, the rule has been established that the equal

protection of the laws means subjection to equal laws, applying alike to all in the same situation, and that,

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

Southern Ry. Co. v. Greene, 216 U. S. 400; 417.

On the same point, we respectfully cite the following:

Bowman v. Lewis, 101 U. S. 22;

Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U. S. 150;

Connolly v. Union Sewer Pipe Co., 184 U. S. 540;

Power Mfg. Co. v. Saunders, 274 U. S. 490.

The police power of the state is subordinate to, and must be so exercised as not to violate the equal protection clause.

Atchison, Topeka & Santa Fe Ry. Co. v. Vosburg, 238 U. S. 56.

A consideration of the Caravan Act in the light of the decisions of this Honorable Court supports the contention of appellee that the enforcement of the said Act against him results in the violation of his rights under each of the mentioned divisions of the Federal Constitution.

Conclusion.

The appellee in this case faces a very grave situation. We respectfully ask this Court to save to him his rights under the Constitution of the United States.

Respectfully submitted,

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APPENDIX A.

Stipulation.

It is hereby stipulated by and between Appellants and Appellees through their respective counsel that by virtue of an error in making up the Record for this Court the following was omitted; that at the hearing before the trial court Appellee's counsel commenced proof of the facts alleged in paragraphs VII and VIII of Appellee's Bill; as appears in the reporter's transcript of said proceedings beginning at line 25, page 103 in words and figures as follows:

"By Mr. Pierson:

"You had occasion, did you, Mr. Morf, on or about the 19th day of September, 1935, to drive a certain 1935 Dodge Sedan motor vehicle which you had purchased in the City of Shreveport—

"Judge Stephens: (Interrupting) I don't believe those facts are denied, are they?

"Mr. Richards: We admit those.

"Mr. Pierson: Do I understand that under your theory they are admitted?

"Judge Stephens: He says so now. The gentleman who is on the stand, the plaintiff, is in that business, and he is transporting cars in that way."

It is therefore stipulated:

That the foregoing may be included in the record on appeal.

Dated this 18th day of January, 1937.

PIERSON & BLOCK,

By RALPH K. PIERSON,

Attorneys for Appellees.

U. S. WEBB, Attorney General of the State of California,

FRANK RICHARDS,

By FRANK RICHARDS,

Deputy Attorney General,

Attorneys for Appellants.

APPENDIX B.

Caravan Act.

[Chapter 402, Statutes of 1935.]

SECTION 1. The term "caravaning" as used in this act shall mean the transportation from without the State of any motor vehicle operated on its own wheels, or in tow of another motor vehicle, for the purpose of selling or offering the same for sale to or by any agent, dealer, manufacturers' representative, purchaser or prospective purchaser, whether such agent, dealer, manufacturers' representative, purchaser or prospective purchaser may be located within or without this State. The caravaning of motor vehicles as herein defined shall be considered as the transportation of property for hire by motor vehicle and shall be subject to all the laws of this State relative to the transportation of property for hire by motor vehicle upon the public highways of this State.

SEC. 2. No person, firm or corporation shall use any highway in this State for caravaning motor vehicles unless and until there shall first have been secured from the Motor Vehicle Department of the State of California a special permit as to each vehicle so caravaned, for use of the highways of this State in caravaning such vehicle, which permit shall be displayed by posting the same upon the windshield of such vehicle or in other prominent place thereon where it may be readily legible. It shall be unlawful to operate three or more vehicles or groups of vehicles in caravan unless a space of at least one hundred

fifty feet shall at all times be maintained between each vehicle or group of vehicles being so caravaned.

SEC. 3. As a condition precedent to the issuance of any special permit provided for in the previous section of this act the Motor Vehicle Department of the State of California shall charge and collect a fee of fifteen dollars for each motor vehicle for which a caravan permit may be issued, whether such vehicle be operated under its own power or in tow of another motor vehicle; provided, however, that no such permit shall be issued by said Motor Vehicle Department unless and until the applicant therefor shall have produced evidence to the satisfaction of said Motor Vehicle Department that all of the laws of this State relating to the transportation of property upon the public highways therefor for hire shall have been complied with.

SEC. 4. No permit issued under this act for caravaning motor vehicles or vehicles shall be transferable either as between persons or as to the vehicle for which it is issued, and shall only be valid for the trip or trips to be specified in said permit, and in no event shall such permit be valid for a period of more than ninety days after it shall have been issued. Such permit shall contain such information and be in such form and shall be issued under such rules and regulations as may be prescribed by said Motor Vehicle Department. Such permit shall be conditioned upon the permittee complying with all laws of the State of California and the United States.

SEC. 5. The fee paid for any caravaning permit issued under this act shall be in lieu of all other registration fees and license fees for the use of public highways in this State by motor vehicle during the period that such motor vehicle may be operated under and in accordance with such permit upon the public highways in this State; provided, however, that nothing in this section shall exempt the owner or operator of such vehicle from compliance, except with respect to fees or license charges, with all laws of this State now or hereafter adopted, relating to the transportation of property for hire.

SEC. 6. All fees from the issuance of permits collected by the Motor Vehicle Department under this act shall be paid into the general fund in the State treasury.

Said department shall file with the Controller on or before February first and August first of each year a detailed account of the receipts of said Department from this source for the six months next preceding. The moneys so derived by the State are intended to reimburse the State treasury for the added expense which the State may incur in the administration and enforcement of this act and the added expense of policing the highways over which such caravaning may be conducted, so as to provide for the safety of traffic on such highways where caravaning is being conducted.

SEC. 7. Violation of the provisions of section 2 or of section 4 of this act is a misdemeanor punishable by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

APPENDIX C.

Parts of the "Vehicle Code" of California.

[Chapter 27, Statutes of 1935.]

140. Misdemeanor to Violate Registration Requirements. It is a misdemeanor for any person to drive or move, or for an owner knowingly to permit to be driven or moved, upon any highway any vehicle of a type required to be registered hereunder which is not registered or for which the appropriate fee has not been paid as required hereunder, subject to such exceptions as are stated in this code.

142. Exemptions from Registration. The registration provisions of this chapter shall not apply to any of the following vehicles:

(a) Any vehicle of a type otherwise subject to registration hereunder which is driven or moved upon a highway in conformance with the provisions of this code relating to dealers, transporters or nonresidents or under a temporary registration permit issued by the department as authorized by section 147 hereof.

(b) Any vehicle of a type otherwise subject to registration hereunder which is driven or moved upon a highway only for the purpose of crossing such highway from one property to another in accordance with a permit issued by the Department of Public Works.

(c) Any implement of husbandry, whether of a type otherwise subject to registration hereunder or not, which is only incidentally operated or moved over a highway.

(d) Special mobile equipment.

146.5. Notice of Application for Registration of Vehicle Previously Registered Outside This State. The department shall forthwith mail a notice of the filing of any application for registration of a vehicle previously registered outside this State to the governmental officer, agency, or authority which made the last registration of such vehicle outside this State. Such notice must contain like data as required on the application filed with the department. No vehicle previously registered outside this State shall be registered in this State nor shall the department issue any certificate of ownership, registration card, nor license plate or plates hereunder therefor prior to the expiration of ninety days from the day on which the application for registration thereof hereunder is filed with said department, but the foregoing limitations in this sentence shall not apply to commercial vehicles operating in interstate transportation nor affect the right of the department to grant temporary permits under section 147.

151. Procedure Upon Registration. The department upon registering a vehicle shall issue a certificate of ownership to the legal owner and a registration card to the owner, or both to the owner if there is no legal owner of the vehicle.

156. License Plates to Be Furnished by the Department. (a) The department upon registering a vehicle shall issue to the owner two license plates for a motor vehicle other than a motorcycle, and one license plate for all other vehicles required to be registered hereunder.

(b) Every license plate shall have displayed upon it the registration number assigned to the vehicle for which it is issued, together with the word "California" or the

abbreviation "Cal." and the year number for which it is issued.

(c) License plates issued for motor vehicles other than motorcycles shall be rectangular in shape, thirteen and seven-eighths inches in length and six and one-eighth inches in width.

180.5. Restriction on Transfer of Vehicle Previously Registered Outside This State. Neither the title to nor any interest in any vehicle previously registered outside this State shall be transferred within this State by any person, whether dealer, manufacturer, or private individual, unless such vehicle is then registered in this State under the provisions of this code.

210. Nonresident Owner Exempt from Registration. (a) A nonresident owner of a foreign vehicle of a type otherwise subject to registration hereunder may operate or permit the operation of such vehicle within this State without registering such vehicle in, or paying any fees to, this State, subject to the following conditions:

(1) That such vehicle at all times when operated in this State is duly registered in, and displays upon it a valid plate or plates issued for such vehicle in the place of residence of such owner.

(2) That such owner obtain and duly display on such vehicle a nonresident permit or its equivalent as hereinafter provided.

(b) The provisions of this section shall not apply to a nonresident owner of a foreign vehicle operated or used within this State for the purposes mentioned in section 215 or section 216 hereof.

215. Registration of Foreign Vehicle Used Commercially. A nonresident owner of a foreign vehicle of a type subject to registration hereunder which is used within this State for the transportation of persons or property for compensation or profit shall register such vehicle as provided in Chapter 1 of this division and the same fees shall be collected as upon the registration of a like vehicle owned by a resident of this State.

216. Nonresidents Conducting Business in This State. Every nonresident, including any foreign corporation, carrying on business within this State and owning and regularly operating in such business any vehicle of a type subject to registration hereunder shall register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this State.

230. Misdemeanors to Violate Registration Laws. In addition to any other offenses relating to registration declared in this code it is a misdemeanor punishable as provided in this code for any person to violate any of the provisions of this division.

237. Operation of Vehicles Without Evidences of Registration. No person shall operate, nor shall an owner knowingly permit to be operated, upon any highway any vehicle required to be registered hereunder unless there shall be attached thereto and displayed thereon when and as required by this code a valid registration card and license plate or plates issued therefor by the department for the current registration year or in lieu thereof a valid permit when and as required in this code.

250. Unlawful to Drive Unless Licensed. (a) It is a misdemeanor for any person to drive a motor vehicle

upon a highway unless he then holds a valid operator's or chauffeur's license issued hereunder, except such persons as are expressly exempted under this act.

(b) It is a misdemeanor for any person to drive a motor vehicle upon a highway as a chauffeur unless he then holds a chauffeur's license duly issued hereunder, except such persons as are expressly exempted under this code.

252. When Nonresident Exempt. (a) A nonresident over the age of twenty-one years having in his immediate possession a valid operator's license issued to him in his home State or country may operate a motor vehicle in this State as an operator only for not to exceed one year without obtaining a license hereunder.

(b) A nonresident over the age of twenty-one years having in his immediate possession a valid chauffeur's license issued to him in his home State or country may operate a motor vehicle in this State without obtaining a license hereunder, but such non-resident must be licensed as a chauffeur under this code before accepting employment as a chauffeur from a resident of this State.

(c) A nonresident over the age of twenty-one years whose home State or country does not require the licensing of operators or chauffeurs may operate a foreign vehicle owned by him for not to exceed thirty days upon display of a valid nonresident permit issued under the provisions of this code without obtaining a license hereunder.

370. Registration Fees. A registration fee of three dollars shall be paid to the department for the registration of every vehicle of a type subject to registration, except for such thereof as are expressly exempted under this code from the payment of registration fees.

371.5. Additional Registration Fee for Vehicle Previously Registered Outside This State. In addition to the registration fee specified in section 370 and any weight fee, there shall be paid a registration fee of three dollars for the original registration within this State of every vehicle previously registered outside this State.

377. Fees for Transfer of Registration. Upon application for the transfer of the title or any interest of an owner or legal owner in or to a vehicle registered hereunder, other than upon a transfer to a chattel mortgagee and other than upon a transfer to a transferee not required hereunder to obtain the issuance to him of a new certificate of ownership and registration card, there shall be paid the following fees:

(1) For a transfer by the owner.....$1.00

(2) For a transfer by the legal owner.....$1.00

(3) For a transfer by the owner and legal owner at the same time.....$1.00

770. Disposition by Cities of Certain Fines and Forfeitures. All fines and forfeitures collected from any person charged with a misdemeanor under this code following arrest by an officer employed by a city, shall be paid into the treasury of such city and deposited in a special fund to be known as the "street improvement fund."

771. Disposition of Other Fines and Forfeitures. All fines and forfeitures collected from any person charged with a misdemeanor under this code following arrest by any officer employed by the State or by a county shall be paid into the treasury of such county in which is located the court imposing such fine or forfeiture and all such

money shall be deposited in a special fund to be known as the "special road fund."

776. Report and Deposit of Money. The department shall file daily with the State Controller a report of all money received by the department and at the same time deposit all such money with the State Treasurer, who shall place the same to the credit of "the motor vehicle fund" which fund is hereby created in the State treasury. The department shall also file with the Controller, on or before February 1 and August 1 of each year, a detailed account of the receipts and disbursements of the department for the six months next preceding. Such accounts shall be open to public inspection when filed.

777. Appropriation for Maintenance of Department. There is hereby appropriated out of such motor vehicle fund all moneys received as transfer fees, operator's and chauffeur's license fees and duplicate operators' and chauffeurs' license fees and all fees for the test of headlights, headlight control devices, auxiliary lighting equipment and signal devices, and in addition thereto such portion of the remainder of such motor vehicle fund not exceeding in any registration year thirty-five per cent thereof as may be necessary for the maintenance of the department to be expended by the department in carrying out the provisions of this code and in enforcing any other laws regulating the operation of vehicles or the use of the highways. All salaries and expenses of the department shall be paid from such appropriation. There shall be deducted from the sums which the department is allowed to expend hereunder such amount as may be allowed to said department in each calendar year under budget appropriation. The department may draw, with-

out at the time furnishing vouchers and itemized statements, sums not to exceed in the aggregate one hundred thousand dollars, said sums so drawn to be used as a revolving fund where cash advances are necessary. At the close of each fiscal year the moneys so drawn must be accounted for and substantiated by vouchers and itemized statements submitted to and audited by the Department of Finance and by the State Controller.

778. Balance of Motor Vehicle Fund Known as "Net Receipts." The balance of the motor vehicle fund after the expenditure of so much thereof as may be permitted by this code for the maintenance and support of the department shall be known as the "net receipts" and shall be devoted to the purposes, and used in the manner, hereinafter provided.

779. Apportionment to Counties. (a) One-half of such net receipts from the motor vehicle fund is hereby appropriated and shall be paid to the counties of this State and the State Controller shall in the months of February and August of each year draw his warrants upon said net receipts in favor of the county treasurer of each county for the amount to which each said county is entitled hereunder. Said payments shall be made to the counties in proportion to the number of vehicles registered in such counties as determined by the places of residence of the owners to whom the registration cards are issued.

(b) In the event the actual domicile, residence or place of abode of an owner of any vehicle registered hereunder is in a county other than the county which the owner has

designated as his place of residence in his application for registration and as shown by the records of the department, then the county auditor of the county receiving such funds from the State as hereinabove provided may draw his warrant in favor of the county wherein is located the actual domicile, residence or place of abode of such owner. Such warrant when so drawn shall be in such total sum as to cover all such vehicles as may properly be attributed to the latter county hereunder in order to secure payment to each county of sums in proportion to registration of vehicles therein according to the actual residences of the owners thereof.

780. No Payments to Counties Until Road Fund Established and Reports Made. The State Controller shall not draw his warrant upon the motor vehicle fund in favor of the county treasurer of any county which has not established a road fund as required by law, or which has failed, neglected or refused to file the report required by law showing the amount of money theretofore received by such county from the motor vehicle fund and the disposition thereof until such county has established such road fund and until such county has made all reports required by law.

781. Remainder of Motor Vehicle Net Receipts Deposited in the State Highway Fund. All moneys remaining in the net receipts in the motor vehicle fund after the expenditures hereinbefore authorized, shall be paid into a fund to be known as the "State highway fund," to be expended in accordance with law.

APPENDIX D.

Parts of "Vehicle License Fee Act" of California.

[Chapter 362, Statutes of 1935.]

SEC. 2. A license fee is hereby imposed for the privilege of operating in this State any vehicle. The annual amount of such license fee shall be a sum equal to one and three-quarters per cent of the actual market value of such vehicle, as determined by the department. The department annually shall compile and publish a list showing the market values as determined by it of each class of vehicle subject to the license fee hereby imposed, such vehicles being classified by make, type and year of manufacture. The license fee imposed by this act shall not apply to any vehicle not subject to registration under the Vehicle Code, nor to any vehicle owned by the State, any political subdivision of the State, or any city, city and county, county, district or public corporation.

SEC. 5. The license fee imposed under this act is in addition to any and all licenses and taxes otherwise imposed, except that no tax according to value shall hereafter be levied or imposed upon any vehicle upon which is paid the license fee required by this act. Such vehicles are hereby exempted from all taxes, State, county or municipal, according to value levied for State or local purposes.

SEC. 6. Whenever any vehicle is operated upon any highway of this State without the license fee having first been paid as required by this act, such fee is delinquent. If such fee is not paid within thirty days after the same becomes delinquent, a penalty equal to such fee shall be added thereto and be collected therewith.

Every license fee and any penalty added thereto, from the date the same becomes due, constitute a lien upon the vehicle for which due.

The department shall collect such fee and any penalty by seizure of such vehicle from the person or persons in possession thereof, if any, and by the sale of such vehicle. The seizure and sale herein authorized shall be conducted and carried out by the department in the same manner as is provided by law for the seizure and sale of personal property by county assessors for the collection of taxes due on personal property. In the event, however, that the records of the department indicate that the registered owner of a vehicle so seized is not the legal owner thereof, as those terms are defined by the Vehicle Code, the department shall, before selling such vehicle, give notice to the legal owner of such vehicle by registered mail addressed to the last known address of such legal owner as shown by the records of the department, at least ten days prior to such proposed sale.

SEC. 7. The duty of collecting the license fee imposed by this act and enforcing the provisions hereof is hereby imposed upon the department. The department shall give to each person paying such license fee a receipt therefor which shall sufficiently designate and identify the vehicle upon which such fee is paid.

SEC. 8. The director of the department shall appoint and fix the salaries of such employees as may be necessary to administer and enforce the provisions of this act.

SEC. 9. All moneys collected by the Department of Motor Vehicles under the terms of this act shall be reported daily to the State Controller and at the same time deposited in the State treasury to the credit of the motor vehicle license fee fund, which fund is hereby created. The moneys in said fund are hereby appropriated as follows:

(a) One per cent, or so much thereof as may be necessary for the use of the Department of Motor Vehicles in the enforcement of the provisions of this act.

(b) Of the remainder of the moneys paid into said fund during the eighty-seventh and eighty-eighth fiscal years, twenty-five per cent thereof shall be paid quarterly to the cities and cities and counties of this State in the proportion that the total population of each such city or city and county bears to the total population of all cities and cities and counties in this State, as certified by the department. For the purpose of this subsection, the population of each city or city and county is that determined by the last Federal census. In the case of a city incorporated subsequent to the last census, or in the case of an unincorporated territory being annexed to a city subsequent to the last census, the department shall ascertain the population of the city or the annexed territory by multiplying the number of registered electors therein by three. The moneys so paid shall be expended by the cities and cities and counties for law enforcement and the regulation and control and fire protection of highway traffic.

(c) Twelve and one-half per cent of said remainder of such moneys shall be paid quarterly during the eighty-seventh and eighty-eighth fiscal years to the counties and cities and counties of the State in the proportion that the population of each such county or city and county bears to the total population of all the counties and cities and counties of the State, as certified by the department. For the purpose of this subsection, the population of each county or city and county is that determined by the last Federal census.

(d) The balance of the moneys in said fund shall on order of the Controller be transferred to the general fund of the State. Out of such moneys so transferred there shall be set apart sufficient moneys in the amount of the principal and interest paid or necessarily to be paid during the eighty-seventh and eighty-eighth fiscal years on the bonds of the State issued under:

(a) The "State Highways Act," approved by the Governor March 22, 1909, and by a majority of the electors at the general election held November 8, 1910;

(b) The "State Highways Act of 1915," approved by the Governor May 20, 1915, and by a majority of the electors at the general election held November 7, 1916;

(c) Section 2 of Article XVI of the Constitution as approved by a majority of the electors at a special election held July 1, 1919; and

(d) Section 3 of Article XVI of the Constitution, as approved by a majority of the electors at the general election held November 2, 1920.

APPENDIX E.

Parts of "Streets and Highways Code" of California.

[Chapter 29, Statutes of 1935]

ARTICLE 5. FUNDS FOR HIGHWAY PURPOSES.
Sections 180-204.

Section 180. State Highway General Fund. The State highway general fund in the State treasury is continued in existence. Any moneys contributed by any county, city, public corporation, district or person may be placed by the commission in the State highway general fund, and shall be expended for the purpose for which contributed. In case the entire sum contributed is not necessary for such purpose, the balance unused shall be returned to the contributor and may be withdrawn in the manner provided by law upon demands made by the Division of Highways.

Section 182. State Highway Fund. The "State highway fund" in the State treasury is continued in existence. The State highway fund is the successor to the State highway maintenance fund and the State highway construction fund, and any appropriation made from the State highway fund, the State highway maintenance fund or the State highway construction fund before the effective date of this code shall continue to be available for the purposes for which it was made.

Section 183. Deposit of money in fund. Appropriation. With the exception of money authorized by law to be deposited in the State highway general fund, all money available for the acquisition of real property or interest therein for State highways, or for the construction, main-

tenance or improvement of State highways or highways in State parks shall be deposited in the State highway fund. The moneys in said fund are appropriated and shall be allocated and expended for the purposes and in the manner provided in this code.

Section 186. General administration and maintenance. For general administration and for maintenance, the department and the commission shall be limited in expenditures, out of the money available each year in the State highway fund, to an amount not exceeding the net revenue derived from one cent per gallon tax on motor vehicle fuel. Of that amount the department shall expend such proportions as the commission determines is necessary for each of the following:

(a) General administration purposes.

(b) Maintenance of all State highways, including all traversable highways between the termini of and approximately on authorized State highway routes.

(c) Maintenance of highways in State parks.

Section 187. County groups. For the purpose of allocating State funds available for highway purposes the counties of the State are placed in these two groups:

Group No. 1. All those counties not included in group No. 2.

Group No. 2. The counties of San Luis Obispo, Kern, Mono, Tulare, Inyo, Santa Barbara, Ventura, Los Angeles, San Bernardino, Orange, Riverside, San Diego and Imperial.

Section 188. Allocation to primary and secondary State highways. Subject to the provision hereinafter contained in this article, all money in the State highway fund not expended for general administration purposes or for maintenance or for the purpose specified in Section 194, shall be allocated and expended as follows:

(a) One-half such money shall be allocated to and expended upon primary State highways. The annual expenditures thereof shall be made within each county group enumerated in Section 187 in amounts which shall bear the same proportion to the total amount available for primary State highway during the current year as the number of miles of primary State highways within each such group bears to the total number of miles of primary State highways in the State.

(b) The remaining one-half shall be allocated to and expended upon the secondary State highways. One-half of such expenditures shall be made in each county group enumerated in Section 187. Not more than four per cent of the money allocated to the secondary State highways in a particular group may be used as State aid to joint highway districts within such group in accordance with the laws pertaining to the financing of highways within joint highway districts.

Section 191. Expenditures from State highway fund. As a further flexible provision with respect to the expenditure of money allocated to primary and secondary State highways from the State highway fund, the department in constructing, improving or maintaining highways

within cities within a particular county group may, on the authorization of the commission, expend for such purposes money allocated to either the primary or secondary State highways in such county group.

Section 193. Purposes authorized for expenditure. The State highway fund money allocated and available each year for primary and secondary State highways, respectively, shall be expended by the department:

(a) On the locations determined by the commission to acquire the necessary real property or interests therein for, and to construct or improve to standards justified by traffic requirements, the primary and secondary State highways, respectively, in the State highway system.

(b) To construct or improve highways in State parks in the manner provided by law.

Section 194. Expenditures within cities. The commission shall allocate annually, and the department shall expend or cause to be expended within the cities of this State, from the State highway fund, an amount equal to the net revenue derived from one-quarter cent per gallon of tax on motor vehicle fuel.

Such expenditures shall be made within each city in the proportion that the total population of such city bears to the total population of all cities in this State. For the purpose of this section the population in each city is that determined by the last preceding Federal census. * * *.

Section 195. Expenditures on streets of major importance other than State highways. Except as provided in Section 200, all moneys allocated under the provisions

of Section 194 shall be expended for the acquisition of real property or interests therein for, or the construction, maintenance, or improvement of streets of major importance within such city, other than State highways, as are agreed upon by the department and the legislative body of the city.

Such expenditures shall be limited to that portion of the street available for use by vehicular traffic except that such funds may be expended for pedestrian underpasses or pedestrian overhead crossings and the installation and maintenance of traffic control devices, but such funds shall not be expended for street lighting, or for the construction or maintenance of sidewalks, or, except as hereinbefore expressly authorized, for the construction or maintenance of any structure or facility in, over, or under the street which is not of direct and primary service in providing a way for vehicular traffic. Sidewalks may be constructed with such funds to replace those removed or damaged by construction or improvement of the street.

Section 196. Delegation of expenditure. "Special gas tax street improvement fund." Any expenditure of money from the State highway fund, as provided in Section 194, shall be delegated by the department to the governing body of such city if the department is satisfied that such city is equipped to conduct the particular work to be delegated in an efficient and economic manner and if the city has set up by ordinance a "Special gas tax street improvement fund."

No moneys shall be expended by the city from such fund except for items specified in the budget and approved by the department as required in this article.

In making any such delegated expenditure a city shall follow the law governing it in regard to the doing of the particular type of work in cases which are not exclusively municipal affairs.

State employees not liable. No state officer or employee shall be liable for anything done, or omitted to be done, by any city in the performance of any delegated work.

Section 197. Annual budget submitted by city. It shall be the duty of the legislative body of each city, on or before the first day of June of each year, to prepare and to submit to the department a budget on such forms as the department may specify, showing the estimated expenditure of such funds recommended to be made during the ensuing fiscal year.

Disapproval by department. The department may refuse to approve any such budget or any item thereof if in the opinion of the department the work proposed to be done or the expenditures proposed to be made, as outlined therein, do not comply with the requirements of this article as to the purposes for which such funds may be expended. The department may also refuse to approve any such budget or any item thereof if in the opinion of the department the proposed expenditure or expenditures are excessive for the work to be done, or if in the opinion of the department adequate provision has not been made in such budget to serve traffic on streets on which any previous expenditure of funds allocated under section 194 has been made, other than such expenditures previously made for maintenance.

Section 198. Quarterly payments to cities. The department shall pay quarterly, as revenues are received

in the State highway fund, to each city to which any expenditure has been delegated, that proportion of its pro-rata share which has been delegated, unless a different schedule of payment is agreed upon between the city and the department. All payments received by a city shall be deposited in its "Special gas tax street improvement fund."

Reductions authorized. In the event that any sums are taken or borrowed from the State highway fund or from the motor vehicle fuel fund, to augment the State general fund, or to pay any appropriations made from the State general fund, the department is authorized to reduce the amounts expended in each proportionately to the reduction in the State highway fund, such reduction to be made up when and if the State highway fund is reimbursed from the State general fund.

Section 199. Approval of plans, etc. Bids and awards of contracts. Before expending any such funds for construction, or improvement of any street except for preliminary engineering, the city shall furnish to the department for approval such surveys, plans, specifications, and estimates of cost therefor as the department may require. When the department has approved the plans, specifications, and estimates, the city may proceed to advertise for bids. The written consent of the department must be secured before any contract may be awarded for an amount in excess of the estimates of cost, or to other than the low bidder on the grounds that the low bidder is not responsible, or before the work may be done by day's labor.

Consent to exceed budget. The written consent of the department must likewise be obtained before the amount

of any item specified in the budget for maintenance or acquisition of real property is exceeded.

Section 200. Accumulation. Expenditure on other highways. To permit the accomplishment of a major project in its entirety, the governing body of a city may authorize the accumulation of money accruing over a period of years from the State highway fund. The legislative body of a city may include in its budget and the department may approve projects for the expenditure of any money accruing to the city under the provisions of this article upon any State or county highway or other major traffic street, including those outside the limits of such city.

Section 201. Maintenance expenditure report. Each city to which an expenditure or expenditures was delegated shall file with the department annually at such time as the department may designate a report showing all expenditures made for maintenance in such detail as the department may require.

Completed project report. Within sixty days after the completion by any city of a delegated project for the acquisition of real property for, or for the construction or improvement of, any street, such city shall file with the department a final report in respect thereto, in such detail as the department may require.

Section 202. Delegation: Street work to department. Any city may contract with the department for the performance by the department of any or all street work in

such city and for such purpose may transfer to the department, for deposit in the State treasury, any moneys available for expenditure by such city for street purposes.

Same: Maintenance to county. Any city may with the approval of the department contract with the county within which such city is located, for the performance by such county of maintenance projects within such city, which projects have been approved by the department.

Section 203. Expenditures on State highways in cities. The commission shall allocate and the department shall expend, or cause to be expended, from the moneys required to be allocated by section 188, an amount not less than the net revenue derived from one-quarter cent per gallon tax on motor vehicle fuel, on State highways within cities.

Such expenditures shall be made within each city in the proportion that the total population of such city bears to the total population of all cities in this State. The population of each city shall be determined as provided in section 194.

Delegation to city. Any expenditure of moneys allocated under this section may be delegated by the department to the city, in the discretion of the department, and on such terms as may be agreed upon by the department and the city.

Guarantee. Purposes. The provisions of this section guarantee and require the expenditure of not less than the amount specified herein but shall not be deemed to pre-

vent the expenditure by the department of a larger amount on the State highways within the cities of this State. The expenditures required by this section shall be made first by the acquisition of real property, or interests therein, for, or the construction, improvement, or maintenance of State highways within cities.

Expenditure of surplus amount. In the event that the department determines that the amount of money available under this section for expenditure in any city is greater than is necessary to adequately maintain and improve to adequate standard all State highways within such city then any surplus amount available for expenditure therein under this section shall be expended for the acquisition of real property or interests therein, for, or the construction, maintenance, or improvement of streets of major importance within such city, other than the State highways and such expenditure shall be made in the same manner and for the same purpose as the expenditure of any money allocated to a city under section 194.

APPENDIX F.

Parts of the "Motor Fuel License Act" of California.

[Statutes, 1933, p. 571, as amended.]

§3. *License tax on distributors.* A license tax is hereby imposed for the privilege of distributing, within the meaning of section 7 of this act, any motor vehicle fuel. Said license tax shall be according to or measured by the gallonage of motor vehicle fuel so distributed in this State and shall be at the rate of three cents for each gallon of such fuel refined, manufactured, produced blended or compounded by such distributor in this State and so distributed by him in this State, or imported by such distributor into and so distributed by him in this State otherwise than in the original package or container in which such motor vehicle fuel was imported into this State, and for each gallon of motor vehicle fuel imported into this State and thereafter acquired by such distributor in the original package or container in which the same was imported and thereafter so distributed by such distributor otherwise than in the original package or container in which the same was imported into this State.

Deductions. From any amount found to be due upon any report hereunder the distributor shall first be allowed to deduct one per cent of the tax otherwise due hereunder to cover subsequent losses occasioned by evaporation and handling.

§13. *Motor vehicle fuel fund: Appropriations.* All money received by the State Controller in payment of license taxes under the provisions of this act shall be by him deposited in the State treasury and credited to the "Motor vehicle fuel fund," which fund is hereby created.

The moneys in said fund are hereby appropriated, subject to the provisions of any budget bill heretofore or hereafter enacted and section 661 of the Political Code, as follows:

(a) To pay the refunds authorized in this act.

(b) To the State Controller, to carry out any duties imposed upon him by this act.

(c) To the State Board of Equalization, to carry out any duties imposed upon it by this act, and the duties of said board arising out of the provisions of section 15 of Article XIII of the Constitution and legislation enacted pursuant thereto.

(d) To the counties of the State as hereinafter provided.

(e) To the State highway fund, as hereinafter provided.

(f) To pay the pro rata share of the overhead and general administrative expense of the State Controller and the State Board of Equalization attributable to duties imposed by this act or under the provisions of section 15 of Article XIII of the Constitution, and legislation enacted pursuant thereto. Such pro rata share shall be payable upon presentation of claim against any appropriation from the motor vehicle fuel fund for the support of the State Controller or the State Board of Equalization, as the case may be.

(g) To pay refunds as may be due on account of judgments for the return of license taxes illegally collected, as provided in section 16 of this act.

One-third of all moneys in said "Motor vehicle fuel fund" after the biennial appropriations to the State Controller and the State Board of Equalization have been deducted and the refunds herein provided for shall have been paid, shall be paid to the counties as hereinafter provided.

Apportionment to counties. Out of said appropriation, each county and city and county shall first be paid seven thousand five hundred dollars for each quarter of a year. The balance remaining in said appropriation after making said apportionment of seven thousand five hundred dollars quarterly shall be apportioned to all of the counties and cities and counties of this State in the proportion that the registration of vehicles in each of such counties and cities and counties bears to the total number of vehicles registered in this State.

All such amounts so paid to the several counties shall be paid into a special road improvement fund and expended as provided by law.

In the event that any such county has not established such a road fund, its proportion of such fund shall be retained by the State until provision for such a road fund has been made, and it shall then be paid over to such county.

Payment to counties. In the months of January, April, July and October of each year, the Controller shall ascertain the gross amounts received and the net receipts remaining after deducting the amounts withdrawn for the support of the Controller and the Board of Equalization and the payment of the refunds for which provision is made in section 11 of this act during the preceding three

months, and thereupon the Controller shall draw his warrant upon the "Motor vehicle fuel fund" in favor of each county in the State for the amount to which each such county is entitled. The Controller shall not draw such warrant in favor of any county which shall not have established such a road fund as is herein required or which shall be delinquent in its annual report to the State Department of Public Works as required by law.

Annual report. Whenever the annual report by any board of supervisors shall not have been duly filed in the manner and form provided by law and at or before the time specified by law, the State Controller shall not draw his warrant in favor of the treasurer of such county until such report has been filed.

"State highway fund." All moneys in the "Motor vehicle fuel fund" other than those hereinbefore appropriated, are hereby appropriated to and shall by the State Treasurer be paid into the "State highway fund," which fund is hereby created.

Department of Public Works. All money thus paid into the State highway fund is appropriated to the Department of Public Works to be expended in accordance with law for the payment of all necessary charges incurred in carrying out the provisions of the Streets and Highways Code, and of any other law relating to the acquisition of real property for and the construction, maintenance or improvement of highways.

APPENDIX G.

Parts of the "Highway Carriers' Act" of California.

[Chapter 223, Statutes of 1935 of California.]

§1. *Definitions.* * * *

(f) The term "highway carrier" when used in this act means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever engaged in transportation of property for compensation or hire as a business over any public highway in this State by means of a motor vehicle or motor vehicles. However, it does not include carriers operating exclusively within the limits of a single incorporated city or city and county, nor does it include persons rendering casual transportation services as an accommodation, and not in the usual or ordinary course of business of such person, nor does it include persons hauling their own products.

§3. *Carriers must secure permit. Petition for permit. Issuance of permit.* Except as hereinafter provided, no highway carrier, other than a highway common carrier, shall engage in the business of transportation of property for compensation by motor vehicle on any public highway in this State without first having obtained from the Railroad Commission a permit authorizing such operation; provided, however, that any highway carrier subject to the provisions of this act, who is in business on the effective date of this act, shall file his application with the commission within thirty days after this act shall take effect. Any highway carrier desir-

ing a permit to operate hereunder as a highway carrier other than a highway common carrier, shall file a petition therefor with the Railroad Commission. Such petition shall set forth the name and address of the applicant; the names and addresses of its officers, if any; full information concerning the financial condition and physical properties of applicant; and such other information necessary to the enforcement of this act, as the Railroad Commission may, by order require. Upon compliance with this act a permit must be issued by the commission, but no such permit shall be granted to a foreign corporation. Pending the issuance of any permit by the commission, the continuance of such operation shall be lawful. Any operating permit not exercised for a period of one year shall lapse and terminate.

§5. *Insurance protection required.* The Railroad Commission shall, in granting permits under the provisions of this act, require the highway carrier to procure, and continue in effect during the life of the permit, adequate protection, as required in section 6 hereof, against liability imposed by law upon such highway carrier for the payment of damages for personal bodily injuries (including death resulting therefrom) in the amount of not less than five thousand dollars on account of bodily injuries to, or death of, one person; and protection against a total liability of such highway carrier on account of bodily injuries to, or death of, more than one person, as a result of any one accident, in the amount of not less than ten thousand dollars; and protection in

an amount of not less than five thousand dollars for one accident resulting in damage or destruction of property whether the property of one, or more than one claimant

§6. *Alternative methods of protection.* The protection required under section 5 shall be evidenced by the deposit with the Railroad Commission, covering each vehicle used or to be used under the permit applied for, of a policy of public liability and property damage insurance, issued by a company licensed to write such insurance in the State of California; or of a bond of a surety company licensed to write surety bonds in the State of California; or of a personal bond, with such sureties as the Railroad Commission shall find adequate to guarantee the protection prescribed in section 5 hereof; or it shall be evidenced by a trust fund in the amount of fifteen thousand dollars, to be held in trust by some institution or person acceptable to the Railroad Commission; or by a combination of any of or all of said methods in such manner that the aggregate of the protection or funds available therefor shall equal the principal sum of not less than fifteen thousand dollars, and such highway carrier shall have the option of the method to be used in obtaining such protection, and may change from one method to another, from time to time, with the consent of the Railroad Commission.

SUPREME COURT
OF THE
UNITED STATES.

October Term, 1936

No. 456.

Ray Ingels, as Director of the Motor Vehicle Department of the State of California; Howard E. Deems, as Registrar of the Motor Vehicle Department of the State of California; John C. Corbett, Fred E. Stewart, R. E. Collins, Ray Edgar and Ray L. Riley, as Members of the State Board of Equalization and Constituting Said Board in the State of California; and E. Seymour,

Appellants,

vs.

Howard Morf, Doing Business Under the Firm Name and Style of Pacific Wholesale Automobile Company; United States Fidelity and Guaranty Company, a Corporation; and Continental Casualty Company, a Corporation,

Appellees.

BRIEF AS AMICUS CURIAE SUPPORTING POSITION OF APPELLEES.

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Attorney for Amicus Curiae.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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Statement as to Amicus Curiae.

Asher and Ponder, a co-partnership, are engaged in the same business as, and are competitors of, Appellees in this action. They now have pending, in the District Court from which this appeal was taken, a similar action, brought on their own behalf against the same principal defendants, decision in which action has been stayed pending the determination of the present appeal. Their interests, therefore, are the same as those of Appellees.

Statement of Case.

The present cause is a suit to enjoin, as unconstitutional, the enforcement of the so-called "Caravan Act" of California (Cal. Stats. 1935, c. 402, p. 1435)—the alleged basis of unconstitutionality being that the Act:

(1) Is an unconstitutional discrimination against, and regulation of, interstate commerce by a State;

(2) Is a denial of the guaranteed Equal Protection of the Laws; and

(3) Is a denial of Due Process of Law.

Briefly stated, the principal provisions of the Act require the payment of a $15.00 fee, *for the benefit of the general fund of the State,* for all *inter*state (but not *intra*state) movement of automobiles travelling on their own wheels (whether under their own power or in tow), if said automobiles travel for the purpose of re-sale (but not if they travel for any other purpose).

Outline of Argument.

I. The Act unconstitutionally regulates, and discriminates against, interstate traffic because it imposes a charge upon interstate commerce without dealing in similar fashion with a similar intrastate commerce equally situated.

II. The Act denies equal protection of the laws because it discriminates:

A. Against interstate, and in favor of intrastate, movement of automobiles;

B. Against automobiles intended for resale and in favor of automobiles similarly driven for other purposes.

III. The Act denies due process of law, because

A. It imposes a regulation bearing no relation to the evils alleged to exist;

B. The evils alleged do not, in fact, exist.

ARGUMENT.

Introduction

The applicable authorities already have been cited to this Court in the Brief of Appellants or will be cited in the Brief of Appellees. Consequently, the *Amicus Curiae* does not intend to burden this Court with elaboration of legal principles not seriously in question.

We take the following to be well settled:

(1) That a state cannot constitutionally prohibit, or discriminate against, Interstate Commerce;

(2) That a lawful business cannot constitutionally be prohibited or harassed, except in the aid of, or alleviation of, an existing, real and significant public evil;

(3) That any regulation of Interstate Commerce, or of a lawful business, must be reasonable and adapted to the removal of the evils alleged to exist.

That the Act affects Interstate Commerce, and Interstate Commerce only, is apparent from its language, is found as a fact by the District Court, and is not questioned by Appellants. That Appellee's business is lawful is unquestioned; and that it will be destroyed by the Act is found by the District Court on evidence ample to support it. Appellants attempt to dispute this finding by the claim (Brief, pp. 8-9) that the fee could be passed on to Appellee's customers. It is apparent, however, that used automobiles, whether or not imported into California, compete not only with each other, but with new cars. It is common sense that a possible purchaser will not forego the pleasures of a shiny new automobile with the latest design and equipment except for a considerable saving in

price. The testimony of Appellee Morf supports the finding that the price of used cars could not be increased by the amount of this fee without driving customers away from the used car market.

With these facts before us, we turn to examine the nature of the Act and its legal effect.

I.

The Act Unconstitutionally Regulates, and Discriminates Against, Interstate Commerce, Because It Imposes a Charge on Such Commerce Not Imposed Upon Similar Intrastate Commerce.

The District Court found specifically that there existed "*considerable*" intrastate movement of automobiles for purposes of re-sale. This finding is supported, amply, by the testimony of Appellee. Against it, Appellants cite only the testimony of one Martland—an unofficial observer—which is summarized in the statement:

> "I don't say it [intrastate caravanning] doesn't exist, but I have never seen it." [R. 58.]

and Chief Cato's admission that there is

> "some caravanning of cars within the state from place to place, but it is small." [R. 54.]

We submit that this inconclusive "negative" testimony that two witnesses had never happened to observe intrastate caravanning affords no basis for disregarding a definite, formal finding by the District Court, based on "affirmative" evidence and the whole record and on that Court's observance of the witnesses, that such intrastate caravanning *did* exist; and that it existed in considerable amount—enough to be a factor in the problem.

This fact of intrastate carvanning itself, even if it stood alone, would be sufficient to distinguish the decision in *Morf v. Bingaman*, 298 U. S. 407, on which Appellants rely. The case cited concerned a statute directed at interstate and intrastate movements alike, and the District Court there had made no finding that intrastate movements did exist in serious number. On the finding made in the present case, the applicable rule is that laid down by this Court in

Guy v. Baltimore, 100 U. S. 434;

West v. Kansas National Gas Co., 221 U. S. 229,

namely: That a state cannot tax, regulate or prohibit Interstate Commerce unless (at the least) it imposes the same controls on Intrastate Commerce similarly situated.

II.

The Act Denies Equal Protection of the Laws Because It Discriminates:

A. Against Interstate, and in Favor of Intrastate, Movement of Automobiles.

This point involves the same facts, and the same legal doctrines, as those just discussed in Point I.

B. Against Automobiles Intended for Re-sale, and in Favor of Automobiles Similarly Driven for Other Purposes.

The Act itself shows that the determining factor is not the type of movement, but the purpose of transportation. Caravanning is defined to include the transportation only of

> "any motor vehicle . . . for the purpose of selling or offering the same for sale . . ." (Sec. 1.)

An owner of motor vehicles may bring them to the borders of California, drive them singly, in tow, or in any other fashion, to any point in the state, with the same conditions as to character of drivers, presence or absence of lights, swaying of cars in tow, observance or violation of local traffic laws, and be entirely free of any fee or attention under this Act, if only he desires those vehicles for some purpose other than re-sale.

The sole basis alleged by Appellants as a foundation for the Act is that carvanning creates traffic hazards. Why this hazard should result from the intention of the owner to sell his automobile, is no where explained!—nor can it be! If such traffic hazards are, in fact, created (as to which reference is made below), they are created by the *manner in which* the automobiles are driven, not by the *purpose for which* they are driven! The restriction of the class to those driven for a single purpose, plainly shows that the alleged basis is false in fact as well as in law.

This becomes even more plain when the situation of the single vehicle is considered. This situation is here presented to this Court for the first time, having expressly been left undecided in *Morf v. Bingaman*. Here the Bill alleged, defendants admitted, evidence showed, and the District Court found, that there was, in fact, single car movement.

Appellants, for obvious reasons, do not attempt to argue that *any* evil results from the interstate (or intrastate) transportation of a single vehicle for the purpose of re-sale that does not result, equally, from the transportation of any other single vehicle for any other purpose. They content themselves with saying (Brief, 49-60) that un-

offending vehicles may be included in order more easily to reach the offending.

This Court has, indeed, held that a small quantity of innocent business can be subjected to restraint where the larger quantity cannot otherwise efficiently be governed. But no such situation exists here:

(1) By Appellants own admission (Brief, p. 47), from 30% to 40% of the automobiles involved move as single units. Surely this is not the "reasonable margin" of which this Court spoke in *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 388; but a definitely separate group, entitled to separate treatment.

(2) Nothing cited is adequate to show why single automobiles cannot effectively be distinguished. *All* the automobiles pass under the scrutiny of the border inspectors. Whether an automobile moves under its own power or in tow of another is a fact observable at a single cursory glance. This is not a case where difficult and expensive investigation would be required to segregate the innocent from the offending; it is not a case where difference of treatment would be difficult. Each car is separately licensed; each one, whether single or in tow, is separately treated on the records of Appellants. Why, then, cannot the single car effectively be given the freedom to which Appellants themselves seem to concede it is entitled?

When attention is directed, as it was by the District Court in its opinion, to the other legislation enacted by the California Legislature at the 1935 session, and particularly at the so-called "Ninety Day Law" (Cal. Vehicle Code, 146.5), held unconstitutional in *Asher and Ponder v. Ingels,* 13 Fed. Supp. 654, which attempted to prohibit

the licensing of any imported automobile for a fixed period of ninety days, the real purpose of the Legislature is made clear. The Legislature desired to suppress the business of importation of used automobiles from other States. To that end, it imposed the unreasonably large, discriminatory fee herein involved and then attempted to "quarantine" the vehicles, after arrival, for so long a period that the cost of keeping them would make profitable re-sale impossible. The two acts clearly show the purpose of the Legislature to have been simply the protection of the California automobile market against used cars imported from other States.

III.

The Act Denies Due Process of Law, Because:

A. It Imposes a Regulation Bearing No Relation to the Evils Alleged to Exist.

The evils alleged by Appellants may be summarized thusly:

(1) Poor drivers;

(2) Improper "spacing" of cars in travel;

(3) Improper methods of coupling cars; and

(4) Violation of local traffic laws—particularly *slow!* driving (Brief, p, 13, lines 11-13), and improper or insufficient lights.

Reference to the various California laws cited and reprinted by Appellants in the Appendix to their Brief, shows that adequate statutory regulation exists, entirely apart from the Caravan Act, to meet every one of these alleged evils. Under sections 250 to 252 of the Vehicle

Code (Brief, pp. 91-92), provision is made for the licensing and control of drivers; under sections 510 and 511 (Brief, pp. 93-95), provision is made as to rate of speed; under sections 525, 531, 582, 618, 621 and 679 (Brief, pp. 95-99), provision is made as to every other claimed evil. If the State of California does not deem these regulations strict enough, she is quite free to amplify them.

These sections constitute direct, equal, non-discriminatory regulations of the alleged evils. Under them, such evils may be eliminated. Under the Caravan Act, the importer pays $15.00 at the border, then is free to continue, at will, without further check. We fail to see how, or wherein, the payment of a fee of $15.00 at the border will serve to improve the quality of driving on the part of the payer's employees.

But, it is claimed, the $15.00 fee permits more adequate policing of the highways inside the State, and, therefore, more efficient enforcement of the sections of the Vehicle Code referred to above. To this there are two answers, each sufficient in and of itself.

(1) *The monies received from this fee are* NOT *used for this purpose.*

While the Act recites (Sec. 6) that the fee is to reimburse the State for the added expense of enforcement, the same section expressly negatives this purpose by placing the monies collected in the *general fund* of the State. Under the Vehicle Code, salaries and expenses of high-

way patrolmen are paid, not from this fund, but from the special *highway* fund. Appellants themselves admit (Brief, pp. 66-70), that there is *no* appropriation of this money to *any* highway purpose, unless the Legislature, in the future, may, perchance, make such an appropriation. It would seem to follow that the fee collected has no relation to the prevention of traffic hazards.

But such prevention is the only possible basis for the validity of the Act. Appellants, at this point in their argument, suddenly abandon the claim that the Act exists to assist in policing the highways, and attempt to support it as a fee for the general privilege of using the highways. But *that* privilege is extended for an annual period, to automobiles not imported in interstate commerce, by the payment of the fee prescribed in the Vehicle License Fee Act (Cal. Stats. 1935, c. 362) (see Brief, pp. 99-100). (Construed as a privilege tax in *Ingels v. Riley,* 5 Cal. (2d) 154, 53 Pac. (2d) 939); and this same Vehicle License fee must be paid by the imported vehicle as soon as it comes to rest in California, since the caravan license

> ". . . shall be valid only for the trip or trips to be specified in said permit, and in no event shall such permit be valid for a period of more than ninety days . . ." (Caravan Act, §4)

the car then being subjected to the other license laws of the State. (Caravan Act, §5.) In other words, the Caravan Act imposes on interstate cars, an *additional* fee, not imposed on intrastate cars equally held for re-sale.

(2) *Finally, the fee charged, even if it were allocated in its entirety to alleviation of the alleged evils, is unreasonable.*

The District Court has found squarely on this point. Under evidence, not contradicted, that Court found that the fee would permit a special officer to accompany *each car* during its entire trip in California, with a profit besides. No one even suggests that such special attention will be given; the head of the Department himself testified that only six men had been added because of caravanning [R. 53.]

It is apparent that the District Court could have made no other finding than that the fee was not intended to be used for, nor was it used for, alleviation of the evils alleged to result from interstate importation of used automobiles.

B. The Claimed Evils Do Not, in Fact, Exist.

On this point, there is a square conflict in the evidence —that for Appellants being that they did, that for Appellees that they did not, exist. Appellee testifies not only that they did not exist as to him, but that other importers were, to his knowledge, equally free of guilt. [R. 60-63.] On this conflicting evidence, the District Court found, *as a fact,* that no serious traffic hazards were created by caravanning, as defined in the Act, that are not equally created by any automobile traffic, and that such hazards as are created by any traffic are not serious. This finding is binding on this Court. It, again, serves to distinguish

Morf. v. Bingaman, where the District Court made an opposite finding. It must be noted that the District Court here did not merely disagree with the supporters of the Caravan Act; that Court found that the supposed evils were fanciful and without significance.

Conclusion.

All of the above propositions—the lack of any real difference between the interstate traffic and the considerable intrastate traffic, the lack of any real difference between traffic for re-sale and that for other purposes, and the lack of connection between the alleged (but non-existent) evils and the remedy set up by the Statute—show, we submit, that the Act is merely an unconstitutional attempt by the State of California to prohibit the lawful interstate business of importing automobiles for re-sale in that State. The District Court so found. We believe this Court should sustain that finding.

Respectfully submitted,

FRANK P. DOHERTY,

Attorney for Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 456.—October Term, 1936.

Ray Ingels, as Director of the Motor Vehicle Department of the State of California, et al., Appellants,
vs.
Howard Morf, doing business under the firm name and style of Pacific Wholesale Automobile Company, et al.

Appeal from the District Court of the United States for the Southern District of California.

[March 1, 1937.]

Mr. Justice Stone delivered the opinion of the Court.

This suit was brought by appellee in the District Court for Southern California, three judges sitting, to restrain appellants, state officers, from enforcing the provisions of the "Caravan" Act, Cal. Stat. 1935, c. 402, as a forbidden burden on interstate commerce, and as an infringement of the due process and equal protection clauses of the Fourteenth Amendment. From a decree granting the relief prayed, the case comes here on appeal under §§ 238 (3), 266, Judicial Code.

The challenged statute defines "caravaning" as the transportation, "from without the state, of any motor vehicle operated on its own wheels or in tow of another vehicle for the purpose of selling or offering the same for sale . . . to any purchaser" located within or without the state. Sections 2 and 3 prohibit caravaning without attaching to each vehicle so transported a special permit issued by the State Motor Vehicle Department, for which a fee of $15 is exacted. A permit is valid only for the trip or trips specified in it, and for a period of ninety days (§ 4). Section 6 directs that the fees collected be paid into the general fund in the state treasury, and declares that they are "intended to reimburse the State treasury for the added expense which the State may incur in the administration and enforcement of this Act, and the added expense of policing the highways over which such caravaning may be con-

ducted, so as to provide for the safety of traffic on such highways where caravaning is being conducted."

Appellee, a resident of Los Angeles, California, carries on his business there as a dealer in automobiles. He purchases used automobiles in other states and transports them from the place of purchase to points on the California boundary line, thence over state highways to Los Angeles, and sometimes to other places, where he offers them for sale. He conducts from 20 to 25% of the total movement in such traffic. Some of his vehicles are coupled together in twos, and move in caravans or fleets, sometimes aggregating more than 30 cars. He gave testimony, which appellants sharply challenge, that from 30 to 40% move singly and not in company with any other vehicle. A permit is required for each car, whether it moves alone or as part of a fleet. The district court found that such movement of vehicles in caravans of more than four create special traffic difficulties, but that the movement of four or less "constitutes no police problem;" that there is considerable like traffic carried on wholly within the state, for which the fee of $15 is not exacted and for which no similar or other fee is required; and that the demanded fee for each car moving in the interstate traffic is excessive and bears no reasonable relation to the increased cost of policing. It concluded, as the appellee contends here, that the statute denies to appellee due process and equal protection, and places a forbidden burden on, and discriminates against, interstate commerce.

We find it necessary to consider only the contention that the licensing provisions burden interstate commerce. We do not discuss appellants' suggestion that, contrary to the finding below, there is no evidence of comparable traffic moving intrastate, and hence no discrimination against interstate commerce by the failure of the Act to exact a fee of those engaged in intrastate commerce. It is not denied that the permit fee, imposed upon those engaged in interstate commerce, burdens this commerce, but appellants urge that it is a permissible charge for the use of the state highways and for the cost of policing the traffic, including the cost of administering the Act.

In *Morf* v. *Bingaman*, 298 U. S. 407, recently before this Court, the Caravaning Act of New Mexico, containing some features similar to the present act, was likewise assailed as burdening interstate

commerce by the imposition of a fee, of $7.50 for each vehicle moving by its own power, and $5.00 for each vehicle towed by another when moving in caravan. The statute made the privilege of using the highway conditional upon payment of the fee. The fees collected were devoted in part to highway purposes. We held that the fees were a charge for the use of the highways, not shown by the taxpayer to be unreasonable, which the state might lawfully demand. Compare *Hendrick* v. *Maryland*, 235 U. S. 610, 624; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, 249, 250.

To justify the exaction by a state of a money payment burdening interstate commerce, it must affirmatively appear that it is demanded as reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce which are within its constitutional power. *Sprout* v. *South Bend*, 277 U. S. 163, 169, 170; *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, 186; *Postal Telegraph Cable Co.* v. *Richmond*, 249 U. S. 252, 259; *Clyde Mallory Lines* v. *Alabama*, 296 U. S. 261, 267. This may appear from the statute itself, *Morf* v. *Bingaman, supra; Clark* v. *Poor*, 274 U. S. 554, 577, or from the use of the money collected, to defray such expense. *Hicklin* v. *Coney*, 290 U. S. 169, 173; see *Kane* v. *New Jersey*, 242 U. S. 160, 168, 169; *Aero Mayflower Transit Co.* v. *Ga. Pub. Serv. Comm.*, 295 U. S. 285, 289; compare *Interstate Busses Corp.* v. *Blodgett, supra*, 249.

Here appellant does not show that the fees collected are used to meet the cost of the construction or maintenance of its highways. Section 6 of the challenged act, which directs that the permit fees be paid into the general fund of the state treasury, is to be contrasted with other California statutes relating to motor vehicles, which exact license fees and taxes and direct that they be paid, at least in part, into special funds devoted to highway purposes. Motor Fuel License Act, § 13, Cal. Stat. 1923, c. 267, as amended, Cal. Stat. 1935, c. 264; Vehicle Code, §§ 776, 781, Cal. Stat. 1935, c. 27; Cal. Stat. 1935, c. 362, §§ 9 (a); 9 (d). See *Interstate Transit, Inc.* v. *Lindsey, supra*, 188-190. Appellants point to no statute appropriating any part of the general fund of the state treasury for highway purposes, and the Street and Highways Code, § 183, Cal. Stat. 1935, c. 29, provides: "With the exception of money authorized by law to be deposited in the state highway general fund, all money available for the acquisition of real property or interest

therein for state highways or for construction, maintenance or improvement of state highways, or highways in state parks, shall be deposited in the state highway fund."

Hence we must look to the statute itself to ascertain the purposes for which the permit fees are collected. On this point it is explicit. It declares (§ 6) that they are intended to reimburse the state treasury for the added expense of administering the Caravan Act and policing the caravaning traffic. This negatives any inference of the purpose of the collection which might otherwise be drawn from the statute, and from its provision that the permit is prerequisite to the use of the highways. Compare *Morf* v. *Bingaman, supra.* It is true that this declaration is not an appropriation of the moneys collected and it does not foreclose the use of the fund for highway maintenance, should the state elect to do so. But until such appropriation is made the statute itself states the legislative purpose, and precludes state officials from asserting that the fees are collected for any other.

The burden rests on appellee to show that the fee is excessive for the declared purpose. *Hendrick* v. *Maryland, supra,* 624; *Interstate Busses Corp.* v. *Blodgett, supra,* 250; *Morf* v. *Bingaman, supra,* 410. But the trial court has found that it is excessive and the finding is amply supported by evidence. In 1934, 9,663 cars were caravaned, and in the first eleven months of 1935, 14,000. This supports the inference of the trial court that 15,000 cars are brought into the state, annually, for sale under the conditions defined in the Act. There was testimony that the expense involved in issuing caravaning permits is "about $5.00 per car", although it appeared that the permit fee for local pleasure cars, numbering 1,960,000, was $3.00 per year, of which only 35% ($1.05) is devoted to administrative expenses.

The Caravan Act became effective September 15, 1935. A permit granted under it is confined to a limited movement from the state boundary to the immediate point of destination. The undisputed evidence shows that prior to the passage of the measure two new district inspectors were appointed solely on account of caravaning, and fourteen new highway patrolmen were "assigned", partially because of caravaning and its effect on traffic. The chief of the California highway patrol, in summarizing this testimony, said that he had put on "approximately six additional men over the whole state

because there were caravans on the road, and I anticipate putting on more men." They receive a monthly salary of $170, which may eventually be increased to $225. The district court found that the evidence indicated that a total of ten men at a salary of $200 a month, and at an aggregate cost of $24,000 a year, would be adequate to police the traffic, whereas the permit fees from 15,000 cars would yield an annual return of $225,000.

We cannot say that the evidence does not support the conclusion of the trial court that the cost of policing would be amply met by a license fee of one-third of the amount so charged. The administrative expense of issuing the permits appears not to have been included, but the testimony that that expense was about $5.00 per car does not bridge the arithmetical gap, and does not impeach the court's conclusion that the permit fee bears no reasonable relation to the total cost of regulation, to defray which it is collected. It rightly held that the licensing provisions of the statute impose an unconstitutional burden on interstate commerce.

On this record we are not required to consider whether the provisions of §2 which make it unlawful "to operate three or more vehicles or groups of vehicles in a caravan unless a space of at least one hundred fifty feet shall at all times be maintained between each vehicle or group of vehicles being so caravaned" may be enforced if applied, independently of the licensing provisions, in a statute non-discriminatory in its operation.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.